86 - 1070

No. .....

In The
Supreme Court of the United States
October Term, 1986

MOUNTAIN STATES LEGAL FOUNDATION, a nonprofit corporation, on behalf of its members, and the Rock Springs Grazing Association,

Petitioners,

v.

DONALD P. HODEL, Secretary of the Interior, James W. Byrd, as United States Marshal of the District of Wyoming, Frank Gregg, individually, former Director of the Bureau of Land Management, and the United States of America,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT — AND APPENDIX —

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QUESTIONS PRESENTED

Does the Bureau of Land Management's violation of its statutory duty to remove wild horses from private land, when requested to do so by the private property owner, and the consequential loss of privately owned forage and water constitute a taking within the meaning of the Fifth Amendment for which just compensation must be paid?

Does the Bureau of Land Management's maintenance of wild horses on private lands constitute an impermissible extension of the Wild Free-Roaming Horses & Burros Act to private lands?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The *en banc* opinion of which review is sought is *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986), and appears at pp. 1a-35a of the Appendix. The order granting rehearing is unpublished, but appears at p. 36a of the Appendix. The order vacating the panel decision is reported as *Mountain States Legal Foundation v. Hodel*, 765 F.2d 1469 (10th Cir. 1985), and appears at p. 37a of the Appendix. The panel opinion, reported as *Mountain States Legal Foundation v. Clark*, 740 F.2d 792 (10th Cir. 1984), appears at pp. 38a-54a of the Appendix. The district court's orders are unreported, but are reproduced in the Appendix at pp. 55a-67a and 70a-74a.

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JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered judgment against the Petitioners on August 22, 1986. By order of the Circuit Justice, the Honorable Byron R. White, the time for filing this Petition was extended to and including December 22, 1986.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982). The decision of the Tenth Circuit raises issues of first impression and the decision conflicts with the decisions of this Court.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

This action was brought pursuant to the Fifth Amendment to the United States Constitution, which provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

In addition, the Petitioners' right to relief also arises under the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (1982). The provision most pertinent to this action provides, in part:

> **§ 1334. Private maintenance; numerical approximation; strays on private land; removal; destruction by agents.**
>
> If wild free-roaming horses or burros stray from public lands onto privately owned land, the owners of such land may inform the nearest Federal marshal or agent of the Secretary, who shall arrange to have the animals removed. . . .

16 U.S.C. § 1334 (1982).

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STATEMENT OF THE CASE

I. Facts and Background

This case concerns whether owners of private lands must bear the economic burden of maintaining wild horses on such land, despite the exclusive and mandatory legal duty of the federal government to control and maintain

the horses on public lands and to remove the horses from private lands when asked to do so.

Petitioners are the Mountain States Legal Foundation,[1] (hereinafter the Foundation) and the Rock Springs Grazing Association (hereinafter "Association"). The Association owns approximately one-half million acres of land in fee and leases approximately one-half million acres from the Union Pacific Railroad. In addition to controlling one million acres of private land, the Association holds grazing permits for approximately one million acres of public land managed by the Bureau of Land Management (hereinafter "BLM"). These lands comprise a "checkerboard" consisting of alternating sections of private lands and public lands that generally follow the route of the Union Pacific Railroad through southwestern Wyoming.[2]

The checkerboard area in question covers an area about 115 miles long by 40 miles wide. The checkerboard land is generally high desert. The soil, once disturbed, is easily eroded by wind and water. Much of the terrain is steep and consists of bad lands and sand dunes. Forage is limited by the soil condition, and is sensitive to overuse.

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[1]Mountain States Legal Foundation is a non-profit, public interest law foundation, dedicated to the preservation of individual liberties and private property rights. Many of the Foundation's members are shareholders in the Rock Springs Grazing Association. The Foundation initiated this lawsuit to protect its members' property interests and constitutional rights.

[2]This pattern of land ownership resulted from the Union Pacific Act of 1862, under which odd-numbered sections of 640 acres each, running along the original rail bed, were granted to the Union Pacific, while even-numbered lots were retained by the federal government.

Few, if any, fences delineate private property from federal property, because it is impractical and potentially unlawful to fence the checkerboard. There are very few waterholes and much of the available water is created by private projects, such as reservoirs and stockwatering ponds.

The Association has used this area since 1909 for winter cattle and sheep grazing. The Association holds federal grazing permits for the federal lands managed by the BLM, and the Association shareholders graze their livestock on both private and federal lands. The horses, virtually all of which are descendants of strays released onto the checkerboard, also roam these same lands year round. These horse herds have continuously grazed the private property as well as the public lands.[3]

In 1971, Congress assumed complete and exclusive control over the wild horses and burros when it enacted the Wild Free-Roaming Horses and Burros Act. 16 U.S.C. §§ 1331-1340 (1982) (hereinafter the "Act"). The Act is intended to protect "all unbranded and unclaimed horses and burros on public lands of the United States," 16 U.S.C. § 1332(b) (1982), from "capture, branding, harassment, or death." 16 U.S.C. § 1331 (1982). The Act declares the animals to be "an integral part of the natural system of the public lands," 16 U.S.C. § 1331 (1982), and mandates that the animals be managed "as components of the public lands." 16 U.S.C. § 1333(a) (1982).

Congress delegated its exclusive control over the wild horses to the Secretary of the Interior and the BLM, di-

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[3]The BLM manages the checkerboard area in question as a single allotment.

recting the agency to manage and protect the horses in order "to achieve and maintain a thriving natural ecological balance on the public lands." 16 U.S.C. § 1333(a) (1982). The Act requires the BLM to manage the horses range use, feed, location at seasons, and numbers. If wild horses or burros stray from public lands on to privately-owned lands, the landowner may request that the federal marshal or the closest agent of the Secretary remove the animals, but the landowner may not remove the wild horses. 16 U.S.C. § 1338 (1982). The BLM or federal marshal must remove the horses from private property within a reasonable time after the request is received.

Following enactment of the Act, the wild horse population grew alarmingly. In 1972, after the Act became effective, 2,364 wild horses were inventoried in the Rock Springs district, and 1,116 of these horses were located on the Association's land. From 1972 to 1976, the BLM did not remove any horses from the checkerboard. By 1974, the situation was sufficiently grave that a BLM study concluded that the horses were increasing by 1,000 head per year, and that reductions were necessary. By 1976, these increases required removal of thousands of horses from the district simply to return the horse herds to pre-Act levels. When this lawsuit was filed in 1979, 6,129 horses were present in the district, 3,413 of which were on the Association's property.

Within six months of the passage of the Act, Petitioners first asked the BLM to remove the horses from private property, in order to stem the accelerating loss

of privately owned forage and water.[4] Petitioners repeated those requests to the BLM verbally and in writing. Indeed, even the Secretary acknowledged the requests to remove the horses. Notwithstanding the repeated requests, no effective efforts were made to remove the horses until the district court's order mandating their removal.[5] By mid-1986, the BLM had removed a sufficient number of horses to reach population levels somewhat in excess of the 1971 levels, and the horses now graze on the Association's property with the tacit permission of the Association.[6] However, the Association has never been compensated for the loss of property occasioned by the BLM's failure to remove the horses, which led to this litigation.

II. Decisions Below

A. The District Court's Decision

In 1979, the Foundation and Association brought an action on behalf of their members against the Secretary

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[4]A single horse consumes 900 pounds of forage and 300 gallons of water in one animal unit month. This is equal to the amount of forage and water needed to sustain one cow for one month. Because the horses use Association property year round, their use was the equivalent of adding an additional 6,800 head of livestock.

[5]Excess horses that are removed from the Rock Springs District are placed for adoption, pursuant to 16 U.S.C. § 1333 (b)(2).

[6]Section 1334 of the Act provides that a landowner may maintain horses on fee or leased land, provided that the horses are protected from harrassment. As the record demonstrates, the Association has always stood ready to permit a reasonable number of horses to graze on the Association's land, if the BLM demonstrates that it can and will control and manage the horses.

of the Interior, and Frank Gregg, the Director of the BLM, personally and in his official capacity, in the United States District Court for the District of Wyoming. The Association asked the court to issue a writ of mandamus to compel the defendants to remove the horses from the Association's private land within one year, and to reduce the size of wild horse herds on adjacent public lands within two years. In addition, the Association sought damages under the Fifth Amendment for the unconstitutional taking of the Association's privately owned forage and water, and personal damages against Gregg[7] for his misallocation of funds, which precluded removal of the horses from the Association's lands.[8]

The trial court issued the writ of mandamus and ordered all wild horses removed from the Association's land within one year and the reduction of the wild horse population on the public lands within two years. The district court also dismissed the claim against the BLM director.[9] Finally, the district court granted summary judgment for the Government on the takings claim.

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[7]The Association sued Frank Gregg personally, under the theory of *Bivens v. Six Unknown Federal Agents*, 403 U.S. 388 (1971).

[8]Gregg was alleged to have diverted funds, originally appropriated for wild horse removal, to an investigation of the treatment of already adopted horses under pressure from various media sources. As a result, the BLM cancelled the wild horse gathering activities for 1979.

[9]The Petitioner appealed the decision dismissing Frank Gregg from the suit. However, the Tenth Circuit determined that the judgment was not final as to the takings claim, and remanded the case to the district court for a final judgment. App. 68a-69a. The issue of Gregg's liability is not pursued here.

B. The Circuit Court's Decision

1. *The Panel Decision*

The Association appealed the dismissal of the claim against Frank Gregg, the director of the BLM, and the grant of summary judgment on the takings claim to the Tenth Circuit Court of Appeals. The government did not challenge the grant of mandamus by cross-appeal. Judges Seth and Holloway, of the Tenth Circuit panel, affirmed the dismissal of Frank Gregg[10] but reversed as to the issue of the taking of forage, holding that Congress' assumption of exclusive and complete jurisdiction assumed by the Act, coupled with the mandatory duty to manage and control delegated to the BLM, was dispositive of the legal issue. The issue for remand was whether the forage lost to the horses by the continued failure to manage horses and by permitting the continued use of private lands by the increased number of horses, rose to the level of a taking. *Mountain States Legal Foundation v. Clark*, 740 F.2d 792 (10th Cir. 1984), *vacated sub. nom Mountain States Legal Foundation v. Hodel*, 765 F.2d 1468 (10th Cir. 1985).

Judge McKay dissented from the opinion of Judges Seth and Holloway, arguing that the Act was no different in scope than other animal protection acts passed by Congress, describing the Act as "a run-of-the-mill regulatory scheme enacted by Congress to insure the survival of a particular species of wild animals." App. 48a. Thus, the injuries suffered by the Association fell within "the long

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[10]Originally, the panel mistakenly affirmed the denial of damages against the Secretary. However, this error was noted and corrected in the *en banc* decision.

standing constitutional rule that regulatory actions mandated by Congress do not constitute a taking for the purposes of the fifth amendment." App. 48a. Judge McKay concluded that Congress did not intend to allow any damages which might arise from the horses' presence, and, instead, intended to allow removal as the only remedy for the type of invasion suffered by Petitioners. Indeed, Judge McKay envisioned that the opinion of the panel laid "the predicate for fifth amendment compensation for all damage to livestock and crops caused by all animals which fall under the control and management of the Department of Interior." App. 52a.

2. *The En Banc Decision*

The Respondents sought a rehearing *en banc* in September of 1984. In March of 1985, rehearing was granted to reconsider whether the Secretary's failure to meet his duty to manage the horses, in accordance with the Act, gave rise to a taking of the Association's property. Judge McKay, writing for the four member majority of the court, characterized the Act as "nothing more than a land-use regulation enacted by Congress to ensure the survival of a particular species of wildlife." App. 13a. The majority concluded that no taking had occurred and affirmed the trial court's order of summary judgment for the Respondents. It also affirmed the dismissal of the claim against the Director of the BLM.

Judges Seth, Holloway and Barrett dissented, in two opinions.[11] In his dissent, Judge Seth emphasized that

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[11]Chief Judge Holloway did not write separately, but instead joined in the dissents authored by Judges Seth and Barrett.

"the BLM has specific duties under the Act but has failed to carry them out." App. 21a. "The agency has admitted facts demonstrating that it has not performed its duties. The case is thus about the consequences of the failure to so perform." App. 22a-23a.

> Thus accepting the authority of the BLM as it has assumed it to be, and its undertaking complete control of the horses, its failure to perform its duties as asserted by the plaintiffs, and as the record shows, has caused the consumption and destruction of plaintiffs' property for a public use without compensation. The plaintiffs are thus entitled to compensation and the relief afforded by the trial court.

App. 26a.

Judge Barrett also dissented from the reasoning of the majority. Judge Barrett disagreed with the majority's characterization of the Act. As Judge Barrett read the Act, "Congress did not intend to burden private landowners but rather intended to have the government assume the complete responsibility for maintaining as well as protecting these animals." App. 30a. "Therefore, if the Wild Free-Roaming Horses and Burros Act is a land-use regulation, it is only with respect to public, not private lands." App. 32a. Judge Barrett concluded:

> Assuming that a private landowner's property is damaged by a failure of the Government to maintain and to manage wild horses and burros on public lands as required by the Act, I believe there can be a violation of the Fifth Amendment Taking Clause. Therefore, summary disposition of RSGA's "taking" claim is inappropriate.

App. 33a.

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REASONS FOR GRANTING THE PETITION

The decision of the Circuit Court conflicts with the precedents established by this Court in its takings jurisprudence. The Circuit Court failed to grant compensation for a physical invasion and loss of property, instead characterizing the conduct at issue as mere land use regulation. In addition, the Circuit Court has impermissibly extended the Act to private property, resolving the issue reserved by this Court in *Kleppe v. New Mexico*, 426 U.S. 529 (1976). For these reasons, this Court should grant this Petition for a Writ of Certiorari.

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THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS ON TAKINGS LAW.

This Court has "long considered a physical intrusion by government to be a property restriction of an unusually serious character for the purposes of the Takings Clause." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Contrary to the balancing test which must take place in determining whether a land use regulation amounts to a taking, the Court has consistently held that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.*[12] A physical invasion is always distinguished from a mere land use regulation because

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[12]This case presents an issue of taking which arises under federal legislation, and is different from the cases usually presented to the Court, which involve taking by state action under the Fourteenth Amendment.

> The government does not simply take a single "strand" from the "bundle" of property rights: [by the invasion] it chops through the bundle, taking a slice of every strand.

Id. at 435 (*citing Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)). The physical invasion is devastating because the private property owner loses the right to exclude all others from his property. For the loss of this right to exclude, the government must pay just compensation. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979); *see also United States v. Causby*, 328 U.S. 256 (1946).

In this case, the wild horses have physically invaded the property of the Rock Springs Grazing Association, and with each bite of forage, the horses consume the entire year's growth of that plant. The forage consumed is a separate property right under Wyoming law.[13] The Petitioners cannot now nor have they ever been able to stop this invasion and the taking of their property. The Act forbids the Petitioners to take any action to remove the horses

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[13]By failing to recognize forage as a separate property interest created by state law, the circuit court has acted inconsistently with this Court's decisions. While the meaning of "property" as used in the Fifth Amendment is a federal question, "it will normally obtain its content by reference to local law." *United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U.S. 266, 279 (1942). Wyoming state law recognizes forage and its use as a separate property right. Wyo. Stat. Ann. § 11-1-10(a)(iii). Crops are generally recognized as personal property (a "profit a prendre"), for which compensation must be paid. *See, King v. United States*, 427 F.2d 767 (Ct. Cl. 1970).

from their property.[14] The BLM has the power to remove the horses from the private property, but they failed to do so, violating the ministerial duty imposed by Congress.[15] By virtue of the BLM's mismanagement of the horses under the Act, the Petitioners have lost the right to exclude the horses, and, as a consequence, have lost their privately owned forage and water to an uncompensated public purpose.

Notwithstanding the precedents of this Court, the physical invasion, the permanent taking of water and forage by the horses, and the BLM's repeated failures to re-

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[14]The Circuit Court casually opined that the Petitioners could protect their property by fencing off the private portions, App. 11a, n.8, notwithstanding the impracticality of fencing or the probability of federal charges under the Unlawful Enclosures Act, 43 U.S.C. §§ 1061-11 (1982 and Supp.). *See, e.g., United States ex rel. Bergen v. Lawrence*, 620 F. Supp. 1414 (D. Wyo. 1985). Moreover, this proposed solution also violates the intent of Congress in passing the Wild Horses Act. "Congress declined to authorize the BLM to fence wild horses. . . ." *Fallini v. Hodel*, 783 F.2d 1343, 1346 (9th Cir. 1986). "Reliance on ranges, and particularly fenced ranges, would defeat the purpose of the legislation, i.e., the survival of wild and free-roaming horses and burros, and substitute a zoo-like concept." S. Rep. No. 92-242, 97th Cong., 1st Sess., 2-3 *reprinted in* 1971 U.S. Code Cong. & Ad. News 2149, 2151-52 (1971). Congress has also rejected any attempt to condition the duty to remove on the existence of fences, in the 1978 amendments to the Act. S. Rep. No. 95-1237, 95th Cong., 2d Sess., 24 *reprinted in* 1978 U.S. Code Cong. & Ad. News 4069, 4088 (1978).

Finally, the checkerboard comprises a portion of the Red Desert area. In the *Final Environmental Impact Statement for Grazing, Sandy Area*, which covers a portion of the Red Desert, the fencing alternative was unacceptable to all parties who commented. (The Sandy Area FEIS covers lands which are adjacent to the checkerboard on the entire northern boundary.)

[15]This Court has never had occasion to decide whether the violation of a mandatory statutory duty and a consequential loss of property gives rise to a taking.

move the horses in violation of its ministerial statutory duty, the Circuit Court held that no taking had occurred. The decision of the Circuit Court conflicts with the precedent established by this Court, and deserves careful and considered scrutiny.

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THE TENTH CIRCUIT'S DECISION RAISES THE ISSUE RESERVED IN KLEPPE v. NEW MEXICO

In *Kleppe v. New Mexico*, 426 U.S. 529 (1976), this Court upheld the constitutionality of the Act as a valid legislative exercise under the Property Clause. The Court held that "the Property Clause also gives Congress the power to protect wildlife on the public lands, state law notwithstanding." *Id.* at 546. However, the Court did not decide "the extent, if any, to which the Property Clause empowers Congress to protect animals on private lands or the extent to which such regulation is attempted by the Act." *Id.*

Here, the Circuit Court characterized the Act as "nothing more than a land-use regulation enacted by Congress. . . ." App. 13a. By doing so, it brings this case squarely into the question reserved in *Kleppe*: Whether the uncompensated taking of forage property, resulting from the failure of the government to perform a clear legal duty to remove wild horses from private lands at the request of

landowners, constitutes an impermissible extension of the Act to private lands under the Property Clause.

Inherent in the *en banc* opinion is the decision that Congress empowered the Secretary and the BLM to regulate private property by application of the Act. Thus, according to the reasoning of the Circuit Court, the horses can be physically maintained on private property, at the expense of private property owners, without payment of compensation for the privately owned forage and water taken. The Circuit Court has decided this important issue in a manner inconsistent with this Court's decisions in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (a permanent physical occupation constitutes a taking without regard to other factors) and *United States v. Causby*, 328 U.S. 256 (1946) (even if the Government physically invades only an easement, it must nonetheless pay just compensation). Clearly, this Court should grant the petition for a writ of certiorari to review the Circuit Court's decision.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari, to correct the issues improperly decided by the Circuit Court and to resolve the issues of first impression raised by its decision.

Dated this 22nd day of December, 1986.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MOUNTAIN STATES LEGAL FOUNDATION, a nonprofit corporation, on behalf of its members who use and enjoy the public lands in the Rock Springs, Wyoming area, and the ROCK SPRINGS GRAZING ASSOCIATION, which owns and leases lands in the Rock Springs, Wyoming area,

Plaintiffs-Appellants,

v.

DONALD P. HODEL, Secretary of the Interior, JAMES W. BYRD, as United States Marshal of the District of Wyoming, FRANK GREGG, individually, former Director of the Bureau of Land Management, and the UNITED STATES OF AMERICA,

Defendants-Appellees,

ENVIRONMENTAL DEFENSE FUND, INC., NATIONAL AUDUBON SOCIETY, NATIONAL WILDLIFE FEDERATION, and DEFENDERS OF WILDLIFE,

Amici Curiae.

No. 82-1485

OPINION ON REHEARING EN BANC

(Filed August 22, 1986)

Constance E. Brooks, Mountain States Legal Foundation, Denver, Colorado (R. Norman Cramer, Jr., Mountain States Legal Foundation, Denver, Colorado, and Calvin Ragsdale of Marty & Ragsdale, Green River, Wyoming,

with her on the supplemental brief on rehearing), for Plaintiffs-Appellants.

Donald Alan Carr, Attorney (Peter R. Steenland, Jr. and Dianne H. Kelly, Attorneys, and F. Henry Habicht II, Assistant Attorney General, with him on the supplemental brief on rehearing), Department of Justice, Washington, D.C., for Defendants-Appellees.

(Michael J. Bean of Environmental Defense Fund, Inc., Washington, D.C.; Hope M. Babcock of National Audubon Society, Washington, D.C.; and Jerry Jackson, National Wildlife Federation, Washington, D.C., submitted a joint brief of amici curiae.)

(Brian B. O'Neill, Amy B. Bromberg and Alan M. Anderson of Faegre & Benson, Minneapolis, Minnesota, submitted a brief of amicus curiae for Defenders of Wildlife.)

Before HOLLOWAY, Chief Judge, SETH, BARRETT, McKAY, LOGAN, SEYMOUR and MOORE, Circuit Judges.

McKAY, Circuit Judge.

The Mountain States Legal Foundation and the Rock Springs Grazing Association (collectively referred to hereinafter as "the Association") brought this action on behalf of their members against the Secretary of the Interior and other government officials to compel them to manage the wild horse herds that roam public and private lands in an area of southwestern Wyoming known locally as the

"checkerboard."[1] The checkerboard comprises over one million acres of generally high desert land and has been used by the Association since 1909 for the grazing of cattle. The lands involved in this case are in the Rock Springs District of the checkerboard, an area approximately 40 miles wide and 115 miles long. Record, vol. 1 at 17; Appellant's Brief at 5-6. In this area of the checkerboard, the Association's cattle roam freely on property owned by the Association and on the alternate sections of land owned by the federal government. Thousands of wild horses also roam these lands.

The Association sought a declaratory judgment that the Secretary had mismanaged the wild horses, and that the Secretary's failure to remove wild horses from the Association's lands was arbitrary and capricious. On this basis, the Association also sought a writ of mandamus to compel the Secretary to remove the wild horses from its lands and to reduce the size of the wild horse herds on adjacent public lands. The Association also sought damages under the Fifth Amendment for the alleged uncompensated taking of its lands. For this alleged taking, the Association sought to recover $500,000 from the Director of the Bureau of Land Management ("BLM") and ten dollars from the United States.

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[1] The "checkerboard" derives its name from the pattern of alternating sections of private and public land which it comprises. The checkerboard scheme of land ownership is a result of the Union Pacific Act passed in 1862. Under the Act, the Union Pacific Railroad Company was awarded the odd-numbered lots of public land along the railbed right-of-way as the company completed each mile of the transcontinental railroad. Today, more than half of the checkerboard remains under federal ownership, while the remainder is held privately.

The district court granted the Association's petition for mandamus, dismissed the Association's claim against the Director of the BLM, and granted summary judgment for the government on the Association's Fifth Amendment takings claim. The Association appealed the dismissal of the claim against the Director and the grant of summary judgment. The government did not challenge the grant of mandamus on appeal. We affirmed the dismissal, but reversed and remanded the grant of summary judgment, holding that an unresolved factual issue precluded a summary determination of the takings claim. *Mountain States Legal Foundation v. Clark*, 740 F.2d 792 (10th Cir. 1984), *vacated sub nom. Mountain States Legal Foundation v. Hodel*, 765 F.2d 1468 (10th Cir. 1985).[2] We granted the government's petition for rehearing en banc to consider whether the Secretary's failure to manage the wild horse herds, in accordance with the requirements of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (1982), gives rise to a claim for a taking of the Association's property under the Fifth Amendment. We also consider whether the trial court properly dismissed the Association's claim against the Director of the BLM.

Wild horses and burros are the progeny of animals introduced to North America by early Spanish explorers. They once roamed the western rangelands in vast herds. But over time, desirable grazing land was fenced off for private use, while the animals were slaughtered for sport

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[2] The panel opinion mistakenly affirmed the trial court's "denial of damages against the *Secretary*." 740 F.2d at 795 (emphasis added). The Association did not seek damages from the Secretary of the Interior. Rather, it sought damages from the Director of the BLM. *See* Record, vol. 2, at 15-17 (Amended Complaint); vol. 3, at 516 (dismissal of Director from suit).

and profit. The herds began to dwindle, and the remaining animals were driven to marginal, inhospitable grazing areas. Alarmed at decline of these herds, Congress in 1971 enacted the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (1982), to protect the wild horses and burros from "capture, branding, harassment, or death." 16 U.S.C. § 1331 (1982). According to congressional findings, these "living symbols of the historic and pioneer spirit of the West" had been cruelly slain, used for target practice, and harassed for sport. S. Rep. No. 242, 92d Cong., 1st Sess., *reprinted in* 1971 U.S. Code Cong. & Ad. News 2149, 2149. Congress also found that the wild horses and burros had been exploited by commercial hunters who sold them to slaughterhouses for the production of pet food and fertilizer. *Id.; see also* Johnston, *The Fight to Save a Memory,* 50 Texas L. Rev. 1055, 1056-57 (1972).

Established under authority granted Congress by the Property Clause of the Constitution,[3] the Act declares wild horses and burros to be "an integral part of the natural system of the public lands," 16 U.S.C. § 1331 (1982), and mandates that the animals be managed "as components of the public lands." 16 U.S.C. § 1333(a) (1982). The Act directs the Secretary to protect and manage the wild horses and burros "in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands." 16 U.S.C. § 1333(a) (1982). Section 1334 of the Act provides that, if wild horses or burros stray from public lands onto privately-owned land, the owner of such lands

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[3] The protection of the wild horses and burros on public lands was upheld as a proper exercise of congressional power under the Property Clause in *Kleppe v. New Mexico,* 426 U.S. 529 (1976).

may inform a U.S. Marshal or an agent of the Secretary, who shall arrange to have them removed. Any person who "maliciously causes the death or harassment of any wild free-roaming horse or burro" is subject to criminal penalties. 16 U.S.C. § 1338(a)(3) (1982). The Department of the Interior has defined "malicious harassment" as

> any intentional act which demonstrates a deliberate disregard for the well-being of wild free-roaming horses and burros and which creates the likelihood of injury, or is detrimental to normal behavior patterns of wild free-roaming horses and burros including feeding, watering, resting, and breeding. Such acts include, but are not limited to, unauthorized chasing, pursuing, herding, roping, or attempting to gather or catch wild free-roaming horses and burros.

43 C.F.R. § 4700.0-5(k) (1985).

The Association alleges that the Secretary has disregarded its repeated requests to remove wild horses from its lands, that it is prohibited by section 1338 of the Act from removing the wild horses itself, and that the wild horses grazing on its lands have eroded the topsoil and consumed vast quantities of forage and water. In support of its Fifth Amendment claim, the Association argues that "it is the panoply of management responsibilities set forth in the Act and its regulations, *including* [section 1334], which . . . subject the United States to liability due to its pervasive control over the horses' existence." Appellant's Supp. Brief on Rehearing En Banc at 8 (emphasis added). In our prior opinion in this case, a panel of this court, with one judge dissenting, found that the government's "complete and exclusive control" over wild horses made the Wild Free-Roaming Horses and Burros Act "unique" in the field of wildlife protection legislation. 740 F.2d at 794.

This degree of control, the court said, was potentially "significant" in determining the government's liability under the Fifth Amendment. *Id.* With the benefit of additional briefing and oral argument, it is now apparent to us that, in the area of wildlife protection legislation, there is nothing novel about the nature and degree of the government's control over wild horses and burros.

At the outset, it is important to note that wild horses and burros are no less "wild" animals than are the grizzly bears that roam our national parks and forests. Indeed, in the definitional section of the Act, Congress has explicitly declared "all unbranded and unclaimed horses and burros on public lands" to be "*wild* horses and burros." 16 U.S.C. § 1332(b) (1982) (emphasis added).[4]

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[4] When the United States Supreme Court considered and upheld the constitutionality of the Act in *Kleppe v. New Mexico,* 426 U.S. 529 (1976), it decided the scope of the federal government's authority over "wildlife" on federal lands and referred consistently throughout its opinion to "wildlife" rather than feral or domestic animals. The Court held that "the Property Clause also gives Congress the power to protect *wildlife* on the public lands, state law notwithstanding." 426 U.S. at 546 (emphasis added). The Court's holding purported to extend to "wildlife" even though an *amicus curiae* brief filed in that case specifically drew the Court's attention to the fact that the horses legislatively deemed wild in the Wild Free-Roaming Horses and Burros Act were in fact feral animals that either had themselves reverted to a wild state or were the progeny of horses that had done so. Brief of Amicus Curiae, International Association of Game, Fish and Conservation Commissioners on the Merits at 4-8, *Kleppe v. New Mexico,* 426 U.S. 529 (1976). The *amicus* brief therefore urged the Supreme Court to limit its holding to feral animals and not to address more broadly the question of federal authority over wildlife on federal lands. *Id.* at 4-13. This the Supreme Court declined to do, thus implicitly accepting Congress' determination to treat the horses as wild. *Cf. Key v. State,* 215 Tenn. 136, 144, 384 S.W.2d 22, 26 (1964) (feral hogs are wildlife protected by the laws of the state).

It is well settled that wild animals are not the private property of those whose land they occupy, but are instead a sort of common property whose control and regulation are to be exercised "as a trust for the benefit of the people." *Geer v. Connecticut,* 161 U.S. 519, 528-29 (1896), *overruled on other grounds, Hughes v. Oklahoma,* 441 U.S. 322 (1979).[5] The governmental trust responsibility for wildlife is lodged initially in the states, but only "in so far as its exercise may not be incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution." *Id.* at 528. *See also Martin v. Lessee of Waddell,* 41 U.S. (16 Pet.) 367, 410 (1842). Neither state nor federal authority over wildlife is premised upon any technical "ownership" of wildlife by the government. Although older decisions sometimes referred to government "ownership" of wildlife, that language has been deemed "a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Toomer v. Witsell,* 334 U.S. 385, 402 (1948). As the Supreme Court declared, "[I]t is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government . . . has title to these creatures until they are reduced to possession by skillful capture." *Douglas v. Seacoast Products, Inc.,* 431 U.S. 265, 284 (1977) (citing *Missouri v. Holland,* 252 U.S. 416, 434 (1920); *Geer v. Connecticut,* 161 U.S. at 539-40 (Field, J., dissenting)).

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[5] *Hughes* overruled the narrow holding of Geer by rejecting the view that a state, without violating the Commerce Clause of the Constitution, may prohibit the export of wildlife lawfully taken within the state.

In exercising their powers "to preserve and regulate the exploitation of an important resource," both the state and federal[6] governments have often enacted sweeping and comprehensive measures to control activities that may adversely affect wildlife. For example, the Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1406 (1982 & Supp. II 1984), establishes plenary federal authority for the conservation of marine mammals and preempts entirely state laws pertaining to their taking. 16 U.S.C. § 1379(a) (1982). While the Wild and Free-Roaming Horses and Burros Act makes it illegal to "maliciously" cause the death or harassment of a wild horse or burro, 16 U.S.C. § 1338(a)(3) (1982), the Marine Mammal Protection Act establishes a federal moratorium of indefinite duration against any "taking" of a marine mammal, a term defined to include harassing, hunting, capturing, or killing, whether done maliciously or not. 16 U.S.C. § 1362(12) (1982). Indeed, even unintentional, inadvertent takings that occur incidental to an otherwise lawful activity are strictly regulated and, for "depleted" marine mammal species, prohibited altogether. 16 U.S.C. § 1371(a)(4)(A), (5) (A) (1982). These prohibitions apply despite the fact that the hearty appetites of some marine mammal species for fish and shellfish often put them in conflict with human competitors for the same resource. Moreover, the mere presence of sea otters in an area may restrict the rights of oil companies or developers to exploit resources that would otherwise produce handsome returns. *See* H.R. Rep. No. 124, 99th Cong., 1st

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[6] Federal authority for the conservation of wildlife has been upheld under the Constitution's treaty-making power, *Missouri v. Holland*, 252 U.S. 416 (1920), commerce power, *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977), and property power, *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

Sess. 16 (1985). Despite their losses, those individuals and corporations are prohibited from "taking" the otters, and they are unable to call upon the government to remove them —as a private landowner can do when bothered by wild horses. *See id.* at 19.

Another wildlife species, the bald eagle, is protected not by one federal law, but by three: the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-711 (1982), the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d (1982) and (in 48 states at least) the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1982 & Supp. 1984). Together, these statutes authorize a degree of federal control at least as "complete and exclusive" as that provided by the Wild Free-Roaming Horses and Burros Act. Indeed, in many respects their commands are far more sweeping. For example, not only is it illegal under each of these laws to capture or kill bald eagles, but the Bald and Golden Eagle Protection Act prohibits removing or destroying their nests or collecting their feathers. 16 U.S.C. § 668(a) (1982).[7]

In addition, the Endangered Species Act makes it illegal to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" any endangered species or attempt to do so, again without regard to whether such actions are done maliciously. 16 U.S.C. §§ 1532(19), 1538(a) (1982).

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[7] The Bald and Golden Eagle Protection Act was amended in 1978 to authorize the Secretary of the Interior to issue regulations permitting "the taking of golden eagle nests which interfere with resource development or recovery operations." 16 U.S.C. § 668a (1982). No such authority exists with respect to *bald eagle* nests, however, whether they interfere with resource development or recovery operations and whether they occur on public or private lands. Bald eagles may not be taken unless the Secretary of the Interior specifically issues a permit. *Id.*

The prohibition against "harming" an endangered species is especially broad, having been construed to mean that one who maintains on his own land grazing animals that so modify natural habitat as to cause indirect injury to endangered species can be required to remove those grazing animals from his land. *Palila v. Hawaii Department of Land and Natural Resources*, 471 F. Supp. 985, 995, 999 (D. Ha. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).[8] Thus, even

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[8] The Endangered Species Act authorizes as an affirmative defense to prosecutions for violations of that Act that the defendant acted to protect himself or another person from bodily harm. 16 U.S.C. § 1540(a)(3), (b)(3) (1982). No similar statutory defense exculpates actions to protect property. Several state courts have held that, as a matter of state constitutional law, a person may kill wildlife contrary to the state's conservation laws where such action is necessary to protect his property. *See, e.g., Cross v. State*, 370 P.2d 371 (Wyo. 1962). No case has yet addressed whether a similar right exists under the United States Constitution, though the bodily injury defense contained in the Endangered Species Act suggests a congressional view that it does not.

Because the Wild Free-Roaming Horses and Burros Act only prohibits the harassment of wild horses when it is done "maliciously," 16 U.S.C. § 1338(a)(3) (1982), it is not clear that the appellants are completely prevented from taking measures to protect their forage from wild horses without running afoul of the proscriptions of the Act. For example, neither Wyoming nor federal law prohibits the Association from fencing out wild horses and burros. In *Anthony Wilkinson Livestock Co. v. McIlquam*, 14 Wyo. 209, 83 P. 364 (1905), the court upheld a landowner's right to erect a lawful fence to keep out his neighbor's trespassing cattle. Although the fence cut off the neighbor's access to public grazing lands, the court concluded that

> so far as the mere right to build fences on his land is concerned, [a landowner] is not prohibited by any law or rule that we are aware of from building a fence along one, or two, or three sides of his premises, or through the center thereof, or upon any other part of his land, if he so chooses, unless by so doing he invades some right of another, or violates some public statute.

(Continued on following page)

though eagles and other endangered species often prey on privately-owned livestock and poultry, the Endangered Species Act prohibits self-help measures which have the effect of "harming" such predators.

With respect to each of these federal wildlife protection statutes, the degree of governmental control over activities affecting the wildlife in question cannot be said to be different in character from that mandated by the Wild and Free-Roaming Horses and Burros Act. Indeed, in some of these examples, the governmental control over the wildlife is more pervasive, more sweeping, and more restrictive than that provided by the Wild Free-Roaming Horses and Burros Act.

Many state wildlife conservation laws provide similar, comprehensive control over activities affecting protected species. Most states, for example, have enacted endangered species laws containing prohibitions that parallel those contained in federal wildlife protection laws.

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Id. at 233, 83 P. at 369. In *Camfield v. United States*, 167 U.S. 518 (1897), the Supreme Court addressed the right of a landowner to enclose his property when it lies in a checkerboard arrangement with public land. In that case, the government maintained that a private landholder could not fence in his odd-numbered lots since to do so would also enclose the even-numbered federal lots. Rejecting the government's argument, the court observed that

> this was a contingency which the government was bound to contemplate in giving away the odd-numbered sections. So long as the individual proprietor confines his inclosure to his own land, the government has no right to complain, since he is entitled to the complete and exclusive enjoyment of it . . . .

Id. at 528.

See, e.g., Cal. Fish & Game Code §§ 2050-2098 (West 1984 & Supp. 1986); Colo. Rev. Stat. §§ 33-2-101 to -108 (1984); Ga. Code Ann. §§ 27-3-130 to -132 (1986); Ill. Ann. Stat. ch. 8, §§ 331-341 (Smith-Hurd 1975 & Supp. 1986); Ind. Code Ann. §§ 14-2-8.5-1 to -15 (Burns 1981 & Supp. 1986); Iowa Code Ann. §§ 109A.1-10 (West 1984); Md. Nat. Res. Code Ann. §§ 10-2A-01 to -09 (1983 & Supp. 1985); Neb. Rev. Stat. §§ 37-430 to -438 (1984).

The foregoing discussion demonstrates the fallacy in the Association's argument that the wild horses are, in effect, instrumentalities of the federal government whose presence constitutes a permanent governmental occupation of the Association's property. In structure and purpose, the Wild Free-Roaming Horses and Burros Act is nothing more than a land-use regulation enacted by Congress to ensure the survival of a particular species of wildlife. It is not unique in its impact on private resource owners.

Of the courts that have considered whether damage to private property by protected wildlife constitutes a "taking," a clear majority have held that it does not and that the government thus does not owe compensation. The Court of Claims rejected such a claim for damage done to crops by geese protected under the Migratory Bird Treaty Act in *Bishop v. United States*, 126 F. Supp. 449, 452-53 (Ct. Cl. 1954), *cert. denied*, 349 U.S. 955 (1955). The United States Court of Appeals for the Seventh Circuit rejected a similar claim under the Federal Tort Claims Act in *Sickman v. United States*, 184 F.2d 616 (7th Cir. 1950), *cert. denied*, 341 U.S. 939 (1951). Several state courts have also rejected claims for damage to property by wildlife protected under state laws. *See, e.g., Jordan*

v. State, 681 P.2d 346, 350 n.3 (Alaska App. 1984) (defendants were not deprived of their property interest in a moose carcass by regulation prohibiting the killing of a bear that attacked the carcass because "their loss was incidental to the state regulation which was enacted to protect game"); *Leger v. Louisiana Dept. of Wildlife and Fisheries*, 306 So.2d 391 (La. Ct. App.), *writ of review denied*, 310 So.2d 640 (La. 1975) (because wildlife is regulated by the state in its sovereign, as distinct from its proprietary capacity, the state has no duty to control its movements or prevent it from damaging private property); *Barrett v. State*, 220 N.Y. 423, 116 N.E. 99 (N.Y. Ct. App. 1917) (damage to timber by beavers not compensable because the state has a general right to protect wild animals as a matter of public interest, and incidental injury by them cannot be complained of). *See also Collopy v. Wildlife Commission, Department of Natural Resources*, 625 P.2d 994 (Colo. 1981); *Maitland v. People*, 93 Colo. 59, 63, 23 P.2d 116, 117 (1933); *Cook v. State*, 192 Wash. 602, 74 P.2d 199, 203 (1937); *Platt v. Philbrick*, 8 Cal. App. 2d 27, 30, 47 P.2d 302, 304 (1935). *But see State v. Herwig*, 17 Wis.2d 442, 117 N.W.2d 335 (1962); *Shellnut v. Arkansas State Game & Fish Commission*, 222 Ark. 25, 258 S.W.2d 570 (1953).

The majority view that rejects takings claims for damage caused by protected wildlife is consistent with the Supreme Court precedent that controls our decision. In *Andrus v. Allard*, 444 U.S. 51 (1979), the Court clarified its stance on the takings clause:

> *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-128 (1978), is our most recent exposition on the Takings Clause. That exposition

need not be repeated at length here. Suffice it to say that government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); see *Penn Central, supra*, at 124.

The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of "'justice and fairness.'" *Ibid.*; see *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. Formulas and factors have been developed in a variety of settings. See *Penn Central, supra*, at 123-128. Resolution of each case, however, ultimately calls as much for the exercise of judgment as for the application of logic.

Id. at 65; *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). More recently, in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), *overruled on other grounds, Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985), the Court emphasized that, in cases involving alleged unconstitutional takings of private property, it

"has generally 'been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.' Rather, it has examined the 'taking' question by engaging in essentially ad hoc, factual in-

> quiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action—that have particular significance." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (citations omitted).

Id. at 295.

In an unbroken line of cases, the Supreme Court has sustained land-use regulations that are reasonably related to the promotion of the public interest, consistently rejecting the notion that diminution in property value, standing alone, constitutes a taking under the Fifth Amendment. *See, e.g., Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (ordinance prohibiting excavation below certain level did not constitute a taking of land used for sand and gravel mining); *Miller v. Schoene*, 276 U.S. 272 (1928) (statute which mandates the destruction of red cedar trees in order to protect apple orchards held not to constitute a taking); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (enactment of zoning ordinance limiting uses of unimproved property reducing property's value by seventy-five percent did not constitute a taking); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (ordinance precluding the manufacture of brick did not constitute a taking even though it reduced value of petitioner's land to less than one-tenth its prior value). In the regulatory context, the Court has said, "the 'taking' issue . . . is resolved by focusing on the uses the regulations permit." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 131 (1978).

It is well settled that a land-use regulation may effect a taking if it "does not substantially advance legiti-

mate state interests . . . or denies an owner economically viable use of his land. . . . " *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (citations omitted). But in *Kleppe v. New Mexico*, 426 U.S. 529 (1976), the Supreme Court recognized the important governmental interest in preserving wild horses and burros in their natural habitat, citing congressional findings that their preservation would " 'contribute to the diversity of life within the Nation and enrich the lives of the American people.' " *Id.* at 535 (citing 16 U.S.C. § 1331 (1970 ed., Supp. IV)). The provisions of the Wild Free-Roaming Horses and Burros Act advance this important governmental interest.

The Association has not argued, or even suggested that the Act deprives it of the "economically viable use" of its property. Rather, it contends that the consumption of forage by the wild horses, standing alone, requires the government to pay just compensation. In determining whether a particular land-use regulation deprives a property owner of the "economically viable use" of his land, the court must examine the impact of the regulation on the property as a whole. *Penn Central*, 438 U.S. at 130-31. The Ninth Circuit has explained:

> [I]t is well settled that taking jurisprudence does not divide a single parcel into discrete segments or attempt to determine whether rights in a particular segment of a larger parcel have been entirely abrogated. The Supreme Court has long since rejected any contention that denial of the use of a portion of a parcel of property is so bound up with the investment-backed expectations of a claimant that government deprivation of the right to use a portion of the property in issue invariably constitutes a taking, irrespective of the impact of the restriction on the value of the par-

cel as a whole. *Penn Central, supra,* 438 U.S. at 130, n.27, 98 S.Ct. at 2662, n.27.

MacLeod v. Santa Clara County, 749 F.2d 541, 547 (9th Cir. 1984), *cert. denied,* 105 S. Ct. 2705 (1985).

Considering the economic impact on the Association's property as a whole, the Act does not interfere with the Association's "distinct investment-back expectations" of using its property for grazing cattle. Nor does it impair the Association's right to hold the property for investment purposes. *See id.* at 547 n.7. Moreover, the Association has not been deprived of its "right to exclude" the wild horses and burros. *See supra* note 8 (discussion of right to fence property); *Kaiser Aetna v. United States,* 444 U.S. 164, 179-80 (1979). Admittedly, the grazing habits of the wild horses have diminished the value of the Association's property. But "a reduction in the value of property is not necessarily equated with a taking." *Andrus v. Allard,* 444 U.S. at 66. In this case, the reduction in the value of the property pales in comparison to that sustained in *Village of Euclid v. Ambler Realty Co.,* 272 U.S. at 384 (75% of property value lost) and *Hadacheck v. Sebastian,* 239 U.S. at 405 (92.5% of property value lost).

Whether a particular land-use regulation gives rise to a taking under the Fifth Amendment is essentially an *ad hoc* inquiry. Although the economic burden imposed on the Association is significant, the Association has not even contended that it has been deprived of the "economically viable use" of its lands. In view of the important governmental interest involved here, we conclude that no taking has occurred and that the district court

correctly granted summary judgment for the government. Because no taking occurred, we also affirm the trial court's dismissal of the Association's claim against the Director of the BLM.

82-1485—MOUNTAIN STATES LEGAL FOUNDATION, etc., et al. v. DONALD P. HODEL, etc., et al.

SETH, Circuit Judge, dissenting:

I must respectfully dissent from the opinion of the majority and from the basic position it represents.

This "basic position" seems to be that the case represents a challenge by plaintiffs to the extent of the authority of, and control over the horses, exercised by the BLM. However, no one challenges this authority nor the extent thereof, but instead it is accepted in its fullest extent and it, as the Government suggests, is complete and is exclusive. The consequences of the existence of this authority and the consequences of the failure by the BLM to perform its duties under the Act is instead the basic issue as will be further described.

The complaint of owners of grazing lands commenced this action against several federal officials and the United States for the unconstitutional taking, without condemnation proceedings, of forage on their private lands and for damage to their land. The taking, and general damage to the range, it is alleged, resulted from the failure by the defendants to manage herds of wild horses contrary to and in violation of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331. Also substantial damages were sought against officials for willfully preventing the prop-

er management of the horses under the Act to the damage of plaintiffs.

This case concerns grazing in the southwestern part of Wyoming known as the checkerboard. These lands are so described because alternate sections are private lands and public lands. In the area in question, which is about 115 miles long and 40 miles wide, the Rock Springs Grazing Association composed of a group of ranchers owns or leases the private lands. The area, of course, generally follows the railroad. The land is described as high desert, the forage is very limited, the area is sensitive to overuse, and there are few if any fences to mark property lines. The Grazing Association has been in business since 1909 and has used the area with seasonal variations during that time. The depositions indicate that with the limited forage and a need to use different portions of the area during different seasons a large acreage is required to support a horse or cow.

The Government acknowledges that the horses have been using plaintiffs' private lands for grazing; that there has been an overpopulation of horses since the BLM assumed control of them; and that requests have been made by plaintiffs under the Act for it to remove the horses from their private lands. The record shows the horses were not so removed.

The Complaint as to the number of horses, states:

> "Plaintiff Rock Springs Grazing Association is desirous of maintaining and preserving a reasonable number of wild horses in the checkerboard area pursuant to previous understandings with the defendants and other interested parties. The Association has expressed to defendants on numerous occasions

> its willingness to accomplish the purposes of the Wild Horse Act and allow a reasonable and manageable number of wild horses to remain on Association land."

The plaintiffs assert, *and the Government agrees,* that the complete and exclusive control and management of the horses is in the Government; that this control is complete; that the Government by the express provisions of the Act must remove horses from private lands when requested; that many such requests have been made by plaintiffs but the horses were not removed and continued to consume the forage on plaintiffs' lands.

The trial court issued the writ of mandamus and ordered all wild horses removed from the Association's land within one year and a reduction in the wild horse population on the public lands within two years. The trial court eventually dismissed the claim against the BLM director and granted the Government's cross-motion for summary judgment on the unconstitutional taking claim. The plaintiffs relinquished their claim for attorneys' fees and costs. The plaintiffs appeal the dismissal of their claim against the BLM director and the court's order denying damages against the Government.

Again it must be emphasized the complaint is that the BLM has specific duties under the Act but has failed to carry them out. These duties relate to the obligation of the agency to control the horses; to move them when the Act requires such action; to capture and remove the horses from the range; and if necessary to sell or to destroy the horses. The Act assumes the ability of the BLM to exercise complete control of the horses. The BLM has as-

sumed it has both the ability and the authority to completely and exclusively control the horses.

The Government seeks on appeal to change the issues, the arguments and the contentions of the parties to make it appear that we are concerned here with the issues presented in other cases wherein the authority of the agency is challenged or where it is asserted that the authority is limited. These are the migratory bird cases, the marine mammal cases and the endangered species cases. However, no one here challenges the ability or extent of authority of the BLM to completely control the horses at all times. This is accepted. The ability of the BLM *as a practical matter* to control the horses wherever they are is a very significant factor, as is its ability to capture, mark, sell and convey title to the horses as would be done as to any domestic animal.

This pervasive control placed in the BLM is thus fully acknowledged by all parties as are the active affirmative duties of the agency under the Act. With no challenge to the BLM's authority and with the assertion of the agency that it indeed has such duties and has the *exclusive* control of the horses the discussion of the cases concerning waterfowl, marine animals and endangered species are interesting historically on the issue of prohibitions on the public, the extent of challenged authority, and are very important in that context but are well outside the issues of this case. We have instead the explicit duties of the BLM acknowledged by it and the admitted failure to perform such duties. Thus we are not exploring the extent, nature and existence of the duties. The agency has admitted facts demonstrating that it has not performed its

duties. The case is thus about the consequences of the failure to so perform.

As it is easy to overlook this basic issue, it is also easy to overlook just what horses we are concerned with on this appeal. The statute, 16 U.S.C. §§ 1331-40, provides (by definition) that it covers "all unbranded and unclaimed horses and burros on public lands of the United States." There are no other qualifications. Thus the category of animals covered is determined by their location—not the nature of the animals but instead where they are found. They are not within the Act when found on state land or private land. The "place" separates them from all other horses unbranded and unclaimed running free. If they are not on public land of the United States they are not under the Act. The Regulations further refine this geographically controlled coverage by adding a date—thus those animals "that have used public lands on or after December 15, 1971." No reference whatever is made to the origin or nature of the animals. Thus *any* unclaimed unbranded horse is within the definition of the Act if it is at the required place at the required time. It is thus apparent that a determined effort was made in drafting to include in the definition for coverage purposes only certain horses by location and date. Nevertheless any horse and all horses here concerned under this test are really domestic animals according to the record. They are not unbranded and unclaimed wild animals—but "all such" horses.

Apparently by design, the horses are not referred to in the Act as "wild horses" or "wild animals". There would seem to be no basis for treating them as wild animals for some purposes and not for others as the Government would have us do. The horses cannot be biologically

so altered by an Act of Congress into "wild animals". We have seen that certain individuals in the Army were made "gentlemen" by Act of Congress but that may not have been all that successful either.

The record shows that the horses here concerned bear recognizable traits or characteristics of particular breeds. These horses in the not too distant past in this area were the ungathered portion of ranch herds maintained by the ranchers as a readily available pool of stock for ranch use and for use by the military. The record shows that particular breeds were from time to time introduced into the herds to improve the quality or characteristics of the pool for specific anticipated uses. Needed horses were easily gathered from time to time.

The statute appears to be drawn to completely exclude all state authority in the control or management of the horses. Thus the statute nowhere refers to the horses as "wild animals" which would permit the states to participate and which would also recognize the interest of the citizens of the state therein. To this end control or movement of the horses by a state official or anyone else constitutes a criminal offense. *See Kleppe v. New Mexico*, 426 U.S. 529 (1976) (*State of New Mexico v. Morton*, 406 F. Supp. 1237 (M.D.N.M. 1975)).

These horses are thus placed in a newly created legal category not wild animals, not estrays, not migratory, not related to treaty obligations but as part of the public lands as the Supreme Court noted. This was an innovative device to exclude state participation and to place exclusive control in the Secretary. This theory is absolutely the only basis advanced to support the jurisdiction of the BLM.

The horses are thus expressly and necessarily made a part of the public lands. The Act says they are "components" of the public lands under the "jurisdiction" of the Secretary. Thus they cannot be described as "wild animals", as the Act avoids doing this, but instead are a part of the public lands—a "component" thereof, a part thereof and that alone.

The nature of the Government's interest in the public lands is certainly clear and it must be recognized that the interest in the components thereof is of the same nature and character. The Act in no way indicates otherwise. There can thus be no issue of ownership of wild animals.

The persons who drafted the statute were thus clear and precise in placing the jurisdiction of the Secretary only on the "component of public land" theory, on his control over the public lands for public use and the Government's ownership thereof. This theory was convincing to the Supreme Court and we should adhere to it.

As herein mentioned, the Secretary is required to remove the horses from private land when requested to do so by the Regulations—§ 4750.3. The Secretary is so *required* to act on request, as would be expected when dealing with something he can control and over which he has actually assumed control. Also he must:

1. Gather and capture and mark horses under stated circumstances. (Capture methods are described in great length in the Regulations.)

2. Relocate horses and move them from place to place. (Removal is described in a separate section of the Regulations.)

3. Transport horses.

4. Offer horses for adoption (sale) and convey title to them on request as would be typical of all horses under state law.

5. See that appropriate use is made of all ranges and multiple use is adhered to.

The Regulations state that their objective is to provide procedures "for protecting, managing and controlling" the horses. The term "controlling" is thereafter implemented in the Regulations in detail with the provisions to carry out the statutory duties. In the statement of policy in the Regulations (§ 4700.0-6) it is provided that "they . . . will be . . . controlled . . . ." In § 4730.1 relating to the inventories the Regulation again provides in planning for "control" certain practices shall be followed and the term "control" is again used in the planning section—§§ 4730.6. This "control" over this component of the public lands must mean that the horses be located and relocated from time to time at places which are in accordance with the management duties of the Secretary and thus where the BLM thinks they should be. No one else can do this—no one else can move them for to do so is a criminal offense.

Thus accepting the authority of the BLM as it has assumed it to be, and its undertaking complete control of the horses, its failure to perform its duties as asserted by the plaintiffs, and as the record shows, has caused the consumption and destruction of plaintiffs' property for a public use without compensation. The plaintiffs are thus entitled to compensation and the relief afforded by the trial court.

The *Bivens* cause of action advanced by the plaintiffs has much appeal under these circumstances where its elements seem to be admitted by the officials and the other facts supporting it are not challenged. However, I am not prepared to extend the doctrine to a complete failure to act.

The value of forage as a separate item of property ownership is acknowledged by the BLM in its regular fees charged for grazing by permittees. 43 U.S.C. § 315-315q. But more importantly in this consideration are the fees charged by the BLM for livestock which trespass on public lands—§ 4720.2(b). These trespass fees are also provided for in the Regulations herein considered and are to be assessed against horses in private ownership which use the public lands without a permit. The BLM by the regular fees and by trespass fees states its view of the value of forage consumed on public land.

Forage as a separate item of property is recognized in Wyoming between private entities. Forage is by statute a crop in Wyoming. Wyo. Stat. Ann. § 11-1-10(a)(iii). Crops are there protected. Crops are recognized generally as personal property, a separate property interest, in condemnation actions, *see King v. United States*, 427 F.2d 767 (Ct. Cl. 1970), and under the common law. An owner of stock is liable therefor when he knows that they will go on the land of another.

The BLM in this action has acknowledged that it administered the checkerboard area for grazing as if it were one range with the public and the fee land together as a unit. The horses were thus controlled as if there was but one ownership of land and forage and thus managed to use the public land and forage, and plaintiffs' land and forage

without a distinction. This consumption of privately owned forage was of course to support the horses for a public purpose.

The Government has thus used and caused the consumption of plaintiffs' property for a public purpose. The component horses obviously have gone upon private land and have consumed plaintiffs' forage. This has been on a regular basis as part of the Government's control of the horses and management of the range as a unit.

The physical "presence" here is not a casual one nor a random one nor one brought about by the movement of ducks or wild animals or any animals by themselves. We are not concerned with geese flying from place to place nor deer moving about. Instead we are here concerned with the physical presence of one of the components of the Government's land directed and orchestrated on a regular basis by the BLM. This was continuous and pervasive because of the affirmative duties to control placed on the BLM by the Act and the Regulations. It was also because of the significant factor that the area was managed and the horses managed without regard to the ownership of the different tracts within it.

The basic elements of a taking are described in *Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978). The opinion makes the distinction just referred to when it states that:

> "[A]ctions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute 'takings.' "

The concern is with the condemnation of forage by the Government which took place at the least after the plaintiffs

requested removal of the horses from private land, and the BLM refused to perform its duty to remove them. We also have the acknowledgment by the Government that there was an overpopulation of horses on this range when suit was filed. The record shows that the BLM again had taken no steps to perform its statutory duty to remove the excess which necessarily included plaintiffs' land.

I would remand the case to the trial court on the issue of the taking of forage from plaintiffs' lands for a factual determination whether such forage was taken by the continued failure to manage the horses and by permitting their continued use of private lands by the increased number of horses and burros since the operative date in 1971. I would further remand for a further consideration of the *Bivens* issue.

I agree with the dissenting opinion by Judge Barrett.

BARRETT, Circuit Judge, dissenting.

I must respectfully dissent. I continue to adhere to the reasoning of the prior opinion by a panel of this court reversing and remanding the grant of summary judgment on the basis that wild free-roaming horses and burros are not "wild animals." *Mountain States Legal Foundation v. Clark,* 740 F.2d 792 (10th Cir. 1984), *vacated sub nom. Mountain States Legal Foundation v. Hodel,* 765 F.2d 1468 (10th Cir. 1985). Assuming, however, that the animals protected under the Wild Free-Roaming Horses and Burros

Act, 16 U.S.C. § 1331-1340 (the Act), are "wild animals," I would nonetheless dissent from the majority opinion. RSGA should not be precluded from litigating its "taking" claim as a matter of law given the Act's unique wildlife protection scheme. Summary judgment is inappropriate and this case should be remanded to the district court to determine whether the facts here, i.e., the amount of damage to RSGA's property and the cause of that damage, entitle RSGA to relief under the Taking Clause of the Fifth Amendment.

I disagree with the majority's characterization of the Act as "nothing more than a land-use regulation enacted by Congress to ensure the survival of a particular species of wildlife." *Mountain States Legal Foundation v. Hodel*, No. 82-1485, slip op. at 14. The plain and unambiguous language of the Act makes clear that Congress intended that wild free-roaming horses and burros be maintained on *public lands* and not on private lands. Unlike the treatment of wildlife in other federal statutes, wild free-roaming horses and burros under the Act are by definition specific to the public lands. As I read the Act, Congress did not intend to burden private landowners but rather intended to have the Government assume the complete responsibility for maintaining as well as protecting these animals.

In the section of the Act entitled "Congressional findings and declarations of policies," 16 U.S.C. § 1331, Congress expressly stated: "It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of

the *public lands.*" (Emphasis added.) Wild free-roaming horses and burros are defined as "all unbranded and unclaimed horses and burros on *public lands of the United States* . . . ." 16 U.S.C. § 1332(b) (emphasis added). "Range" is defined as "the amount of land necessary to sustain an existing herd or herds of wild free-roaming horses and burros, which does not exceed their known territorial limits, and which is devoted principally but not necessarily exclusively to their welfare in keeping with the multiple-use management concept for the *public lands* . . . ." 16 U.S.C. § 1332(c) (emphasis added). "Public Lands" is defined as "any lands administered by the Secretary of the Interior through the Bureau of Land Management or by the Secretary of Agriculture through the Forest Service." 16 U.S.C. § 1332(e).

The Act directs the Secretary to manage wild free-roaming horses and burros on and as part of the public lands:

> The Secretary is authorized and directed to protect and manage wild free-roaming horses and burros as *components of the public lands,* and he may designate and maintain specific *ranges on public lands* as sanctuaries for their protection and preservation . . . . The Secretary shall manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance *on the public lands.*

16 U.S.C. § 1333(a) (emphasis added). Section 1334 of the Act also makes clear Congress' express intent that wild free-roaming horses or burros be *maintained* on the public lands and not on private lands: "If wild free-roaming horses or burros *stray from public lands* onto privately owned lands, the owners of such land may inform the near-

est Federal marshall or agent of the Secretary, *who shall arrange to have the animals removed.*" 16 U.S.C. § 1334 (emphasis added). While a private landowner *may* choose to maintain these animals on his property, *id.*, it is clear under the Act that the Secretaries have an affirmative and mandatory duty to remove wild horses from private lands at the request of landowners, consistent with congressional intent that these horses be maintained on public lands. Therefore, if the Wild Free-Roaming Horses and Burros Act is a land-use regulation, it is only with respect to public, not private lands.

The majority not only incorrectly characterizes the Wild Free-Roaming Horses and Burros Act as a land-use regulation, but also inappropriately compares the Act with other federal wildlife statutes. My research reveals that the Wild Free-Roaming Horses and Burros Act is the only federal wildlife act which imposes a duty upon an agency of the federal government to manage and to maintain wildlife specifically on the public lands. Again, assuming *arguendo*, that wild horses and burros are "wild animals," the Act is nonetheless unique in the duty Congress imposed on the Secretaries of the Interior and Agriculture to maintain and to manage these animals *on the public lands*. The specific and identifiable duty imposed upon the executive branch to maintain and to manage these animals on *public lands* is the feature which makes the Act unique among federal wildlife statutes. While other wildlife conservation laws may also authorize and require exclusive governmental control over wildlife, this Act is unique insofar as the complete and total control of the government over wild free-roaming horses and burros is tied to public lands.

The "taking" issue before us in this case is specific to the Wild Free-Roaming Horses and Burros Act. Properly stated, the issue is whether damage to private property by wild horses caused by the failure of the Government to remove the horses from private lands at the request of landowners constitutes a violation of the Fifth Amendment Taking Clause under the Act? Assuming that a private landowner's property is damaged by a failure of the Government to maintain and to manage wild horses and burros on public lands as required by the Act, I believe there can be a violation of the Fifth Amendment Taking Clause. Therefore, summary disposition of RSGA's "taking" claim is inappropriate.

The Fifth Amendment of the United States Constitution provides in relevant part: "nor shall private property be taken for public use without just compensation." While the Supreme Court has apparently never addressed the issue of whether property damage caused by wild animals can constitute a taking, *see generally,* Note, "The Liability of the Federal Government for the Trespass of Wild Horses and Burros," 20 *Land & Water L. Rev.* 493, 506 (1985), the majority applies the "land-use regulation" taking cases to this case. As noted above, I do not believe this is a land-use regulation case nor do I believe this case can be decided as a matter of law based upon prior Supreme Court decisions.

The Supreme Court has often stated that there is no "set formula" for determining when justice and fairness require that economic injuries caused by public action (or inaction) must be deemed a compensable taking. *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1005 (1984) (citations omitted).

> [W]e have eschewed the development of any set formula for identifying a "taking" forbidden by the Fifth Amendment, and have relied instead on ad hoc factual inquiries into the circumstances of each particular case. To aid in this determination, however, we have identified three factors which have "particular significance:" (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action."

Connolly v. Pension Benefit Guaranty Corp., 106 S.Ct. 1018, 1026 (1986) (citations omitted).

While the general rule is that a Fifth Amendment taking claim is to be determined on a case by case basis, the Supreme Court has held that a permanent physical invasion by the Government constitutes a taking *per se* without regard to other factors that a court might ordinarily examine. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982). All other taking claims not involving a permanent physical invasion must be resolved by an ad hoc inquiry considering the factors set forth above. *Id.* RSGA apparently does not contend that the presence of wild horses upon its property constitutes a permanent physical occupation. Therefore, the resolution of RSGA's taking claim in this case must be made upon a review of the facts in light of the factors articulated by the Supreme Court.

The Supreme Court has stated: "The purpose of forbidding uncompensated takings of private property for public use is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Connolly*,

106 S.Ct. at 1027, quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960). In this case it is not only fair and just that the Government not impose a burden on a few individuals to sustain wild free-roaming horses and burros, but it is also the express intent of Congress that private landowners not be required to share the burden of sustaining these animals which compete with livestock for scarce and valuable high plains forage. RSGA should be given an opportunity to demonstrate how and to what extent it has been harmed by the failure of the Secretaries to remove the horses from its property. The majority concedes that "the economic burden imposed on the Association is significant . . . ." *Mountain States Legal Foundation v. Hodel*, No. 82-1485, slip op. at 19. In light of the direct impact of the Secretaries' action under the Act on RSGA's land, I am not prepared to hold as matter of law that a compensable "taking" has not occurred in this case. I would therefore reverse the district court's holding that "the use of private lands by excess horses under the Act does not rise to the level of a Fifth Amendment violation" and remand the case to the district court for fact-finding consistent with the Supreme Court's previous holdings regarding "taking" claims.

I fully concur in the views expressed by Judge Seth in his separate dissenting opinion.

HOLLOWAY, Chief Judge, joins in the dissents of Judge Seth and Judge Barrett.

MAY TERM—July 1, 1985

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth and Honorable Monroe G. McKay, Circuit Judges.

MOUNTAIN STATES LEGAL FOUNDATION, etc., et al.,

Plaintiffs-Appellants, No. 82-1485

v.

DONALD P. HODEL, et al.,

Defendants-Appellees.

The Court, on its own motion, hereby orders that its judgment entered in the captioned cause on July 23, 1984 is vacated.

It is the further order of the Court that its opinion filed in the captioned cause on July 23, 1984 is withdrawn.

/s/ Howard K. Phillips, Clerk

MARCH TERM—March 29, 1985

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

MOUNTAIN STATES LEGAL FOUNDATION, etc., et al.,

Plaintiffs-Appellants, No. 82-1485

v.

WILLIAM P. CLARK, etc., et al.,

Defendants-Appellees.

This cause comes on for consideration of appellees' petition for rehearing and suggestion for rehearing en banc.

On consideration of the petition for rehearing and suggestion for rehearing en banc it is ordered that rehearing en banc is granted. Judge Seth and Judge Barrett voted to deny rehearing en banc.

/s/ Howard K. Phillips, Clerk

MOUNTAIN STATES LEGAL FOUNDATION, a non-profit corporation, on behalf of its members who use and enjoy the public lands in the Rock Springs, Wyoming area, and the Rock Springs Grazing Association, which owns and leases lands in the Rock Springs, Wyoming area, Plaintiffs-Appellants,

v.

William CLARK, as Secretary of the Department of the Interior, James W. Byrd, as United States Marshal of the District of Wyoming, Frank Gregg, individually, former Director of the Bureau of Land Management, and the United States of America, Defendants-Appellees.

No. 82-1485.

United States Court of Appeals,
Tenth Circuit.

July 23, 1984.

Before SETH, Chief Judge, and HOLLOWAY and McKAY, Circuit Judges.

SETH, Chief Judge.

The complaint of plaintiffs, who are owners of grazing lands, brought this action against the Secretary of Interior and the United States for the unconstitutional taking, without condemnation proceedings, of forage on their private lands. This taking, it is alleged, resulted from the failure by the defendants to manage herds of wild horses contrary and in violation of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331 et seq. Mandamus is sought to require defendants to remove the horses from plaintiff's lands. Also substantial damages were sought against the Secretary of Interior and other

officials for willfully preventing the proper management of the horses under the Act to the damage of plaintiffs.

This case concerns grazing in the southwestern part of Wyoming known as the checkerboard. These lands are so described because alternate sections are private lands and public lands administered by the Bureau of Land Management under the Taylor Grazing Act. The ownership is thus checkerboarded. In the area in question, which is about 115 miles long and 40 miles wide, the Rock Springs Grazing Association composed of a group of ranchers owns or leases the private lands. The area, of course, generally follows the railroad. The land is described as high desert, the forage is very limited, the area is sensitive to overuse, and there are few if any fences to mark property lines. The Grazing Association has been in business since 1909 and has used the area with seasonal variations during that time. The depositions indicate that with the limited forage and the need to use different portions of the area during different seasons a large acreage is required to support a horse or cow.

The affidavits show that horses have used the range since ranchers have been in the area. The horses were originally from ranchers' herds as all were not gathered, but were left on the range to be available as a source of ranch horses and horses for sale for military and general use. The record shows that studs of good varieties were introduced by the ranchers to improve the herds. The depositions describe the different strains or breeds of horses which so resulted and which can be now recognized.

There apparently has been no attempt in recent years, and certainly not since 1971, by the ranchers to manage the herds of horses. It appears that a large percentage of

the horses in the area are unclaimed. Since the Government has assumed control of the horses their numbers have increased greatly. The horses compete for forage with wild animals and with livestock on the entire range.

The complaint alleges that the Secretary has mismanaged the public lands in the Rock Springs District in that he has not managed the horses in accordance with the Wild Horse Act thereby causing a deterioration of the range. The Government admits the horses have been using plaintiffs' lands.

The complaint states that requests have been made that the horses be removed from plaintiffs' lands. This the Government also admits. The complaint as to the number of horses, states:

> "Plaintiff Rock Springs Grazing Association is desirous of maintaining and preserving a reasonable number of wild horses in the checkerboard area pursuant to previous understandings with the defendants and other interested parties. The Association has expressed to defendants on numerous occasions its willingness to accomplish the purposes of the Wild Horse Act and allow a reasonable and manageable number of wild horses to remain on Association land."

The plaintiffs allege that the control and management of the horses is exclusively in the Government (and the Secretary agrees); that this control is complete; that the Government by the express provisions of the Act must remove horses from private lands when requested; that many such requests have been made by plaintiffs but the horses continued to consume the forage on plaintiffs' lands and thereby a taking of their property resulted. The plaintiffs sought a writ of mandamus to have the horses re-

moved from their property, prayed for nominal damages for the consumption of forage, and for substantial damages against the Secretary for failure to administer the Wild Horse Act and thereby causing damage to plaintiffs.

The trial court issued the writ of mandamus and ordered all wild horses removed from the Association's land within one year and a reduction in the wild horse population on the public lands within two years. The trial court eventually dismissed the claim against the BLM director and granted the Government's cross-motion for summary judgment on the unconstitutional taking claim. The plaintiffs relinquished their claim for attorneys' fees and costs. The plaintiffs appeal the dismissal of their claim against the BLM director and the court's order denying nominal damages against the Government.

The horses generally, and especially those with identifiable characteristics of particular breeds, cannot be classified as "wild animals" in an attempt to compare them or the Act to other statutes relating to wild birds and wild animals. The horses do not have to be "wild animals" to come within the Act, but other requirements must be met. In the checkerboard area, the parties have assumed that the horses in question come within the definition in the Wild Horse Act.

Since the Government has assumed jurisdiction over the horses under the Act it has thereby taken the exclusive and complete control of the horses and also the duty to manage them. As to control, the Act and Regulations permit no one else to move the horses no matter where they are. No one else can manage the horses. Landowners cannot move them from their land. If the horses

stray from public lands onto private lands the owners must request the Government to remove the horses if they want them off their land.

It is this complete and exclusive control which makes the Act unique. It cannot be compared, as we have stated, with statutes which relate to wild animals or birds. The drafters of the Act so made the control exclusive in the Government and complete with both the affirmative and negative provisions (with criminal penalties). The implications of the complete and sole control must be examined and applied to the legal relationship of the parties. This degree of control can become the significant factor in an examination of the liability of the Government.

The control feature is reinforced by an affirmative express management duty on Interior. The Act thus presumes (and the agency apparently acknowledges) that the management responsibility can and must be carried out. This is the physical management of the horses as to range use, water, location at seasons, and numbers. Thus it is mandated that the horses can be moved to places they should use for good range management and that their numbers be kept within proper limits.

The Act further presumes that Interior can and will control and manage the horses by including an explicit duty on Interior to remove the horses from private land when requested to do so. The agency has assumed this duty and an ability to so act.

The plaintiffs allege that the Secretary has not managed the horse herds as required in the Act, has not controlled them or their numbers, *see American Horse Protection Ass'n v. Andrus,* 460 F.Supp. 880 (D.Nev.1978),

and also it has not removed horses from their private lands when requested to do so. *See Roaring Springs Associates v. Andrus,* 471 F.Supp. 522 (D.Nev.1978). Requests to remove the horses it is alleged were made by the plaintiffs at the many meetings with the BLM, and later formal written requests were made all of which the Secretary acknowledges. Requests were also made to reduce the number of horses on the checkerboard to reduce damage to the range. All concerned acknowledged the increase in numbers was causing problems. The Secretary in his Answer herein said:

> "Admit that an increase in wild horse population has resulted in an over-population and an excessive demand on the public range."

The requests to remove the horses were not met despite the statutory duty of Interior. This inaction knowingly permitted the horses to consume forage on plaintiffs' private land according to the pleadings and affidavits. This is alleged by plaintiffs as a taking of their forage crop—a taking of their *private personal property.* Substantial damages resulting from the taking of the forage is described but only nominal damages are prayed for.

The cause of action, and the allegations relating to failure to manage the horses on a sound ecological basis under Congressional policy statements, was never put in issue. The Government seems to have taken no position because it answered that it was without knowledge or information on the matter. The trial court did not include these causes of action and issues in his determination of the case.

It is only by reason of the checkerboarded ownership of the lands that horse control and management could become a factor or issue on the taking of plaintiffs' property. The BLM horse management practices for the District, insofar as it covers the checkerboard, is and was as applicable to private lands as it was to public lands. The Act was so drafted that the BLM was the only one who could *in any way* manage or control the impact of the increased number of horses using everybody's land. The affidavits describe the range damage caused by the increase in the number of horses and their seasonal management. This overuse was asserted to include consumption of the forage crops of plaintiffs and thereby it was alleged that a taking of private property had taken place.

The taking allegations are also based on the refusal of the BLM to remove the horses from plaintiffs' land. This may or may not be distinct from asserted failure to manage under the Act.

The allegations as to a taking do not refer or rely on a single event or occurrence but to a continued course of action during the year for a period of years. Personal property is within the constitutional protection as to "taking". *United States v. 12.18 Acres of Land in Jefferson County, Kansas*, 623 F.2d 131 (10th Cir.1980); *King v. United States*, 427 F.2d 767 (Ct.Cl.1970). *See* also *Pennsylvania Hospital v. Philadelphia*, 245 U.S. 20, 38 S.Ct. 35, 62 L.Ed. 124 (1917).

The issuance of the writ of mandamus did not become an issue on this appeal and no position is taken as to it.

The denial of damages against the Secretary is affirmed. The judgment of the trial court is reversed as

to the issue of the taking of forage for a factual determination whether such forage was taken by the continued failure to manage the horses and by permitting their continued use of private lands by the increased number of horses and burros since 1971.

IT IS SO ORDERED.

McKAY, Circuit Judge, concurring in part and dissenting in part:

However innocuous it may at first appear, the court's opinion represents a radical departure from established constitutional precedent with sweeping implications for the enforcement of all environmental regulatory statutes.

The Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340, was enacted by Congress in 1971. 16 U.S.C. §§ 1331-1340 (1982) (the Act). The primary purpose of its enactment was the protection of animals declared by Congress to be "living symbols of the historic and pioneer spirit of the West" and which animals "contribute to the diversity of life forms within the nation and enrich the lives of the American people." 16 U.S.C. § 1331. *See also* S.Rep. No. 242, 92d Cong., 1st Sess., *reprinted in* 1971 U.S. Code Cong. & Ad.News 2149-50. According to congressional findings, these animals had been cruelly slain, used for target practice and harassed for sport and profit. *Id.* The Act sets out: congressional findings, 16 U.S.C. § 1331; defintions, *id.* § 1332; the powers and duties of the Secretary of the Interior to whom jurisdiction of the wild horses and burros has been entrusted, *id.* § 1333; a scheme for private maintenance, *id.* § 1334; and criminal provisions, *id.* § 1338.

In structure and purpose, the Wild Free-Roaming Horses and Burros Act is essentially identical to the Protection of Bald and Golden Eagles Act. 16 U.S.C. §§ 668-668(d) (1982). The Bald and Golden Eagles Act prohibits possession, commerce, killing or other activities with reference to the bald and golden eagle, whether dead or alive, their eggs and nests, with both criminal and civil penalties for violation. The Act is absolute in its terms except that there is a provision for obtaining a permit from the Secretary of Interior to destroy or remove eagles that are destroying livestock or agricultural crops. *Id.* § 668(a). This ameliorative provision is essentially identical to the ameliorative provision of the Wild Free-Roaming Horses and Burros Act. 16 U.S.C. § 1334 (1982). Under some circumstances, even the Secretary may not issue a permit for the taking of eagles even if they do damage to animals and crops. *See* 50 C.F.R. § 22.23(c) (1983).

There are numerous other similar statutes and regulations particularly relating to endangered species, 16 U.S.C. §§ 1531-1543 (1982), some of which notoriously do damage to domesticated livestock and agricultural crops. The list of endangered species includes the Grizzly Bear, San Joaquin Fox, Jaguarundi, Ocelot, Florida Panther, Utah Prairie Dog, Red Wolf, and Grey Wolf. 50 C.F.R. § 17.11 (1983). In these endangered species statutes, there is no provision, with the exception of the Grizzly Bear, to remove or destroy the endangered animals if they do damage to livestock. *See* 16 U.S.C. § 1539 (1982); 50 C.F.R. §§ 17.1 to 17.40.

It is important to set forth the detailed parallels in other government statutes and regulations in order to un-

derstand what is at stake in this case. Notwithstanding the court's implied suggestion to the contrary, the horses and burros regulated under this Act are legally wild in the same sense that any other "wild" animal is wild. The Act declares them to be so. 16 U.S.C. § 1332(b); *see also* 1971 U.S.Code Cong. & Ad.News at 2149, 2153.

It is conceded that the basic stock of wild horses and burros were on the checkerboard lands before the ranchers in this action obtained these lands. The fact that they were once domesticated and that the herds have been supplemented by other animals which were once domesticated is totally irrelevant. There is no authority whatever for suggesting that Congress cannot declare free roaming, unclaimed animals to be "wild." The beginning point for an analysis of the issues in this case is the fact that the Act is a scheme designed to regulate wild animals just as all the other acts regulate animals, birds, and insects not owned by someone. Thus, to sustain this attack on the Wild Horses and Burros Act (at least so far as it is based on the notion of fifth amendment taking) is to fundamentally undermine all of the environmental protection schemes which Congress and state legislatures in their wisdom may undertake to enact.

Notwithstanding the court's contrary assertion, there is to my mind nothing legally unique about this Act. What the court has said about the federal government's relationship to the wild horses and burros may be equally said about the wild animals regulated by the acts set forth above. As the court has said about the wild horses:

> Since the government has assumed jurisdiction over the horses [eagles, bears, foxes, panthers, wolves

> etc.] under the Act[s] it has thereby taken the exclusive and complete control of the horses [animals] and also the duty to manage them. As to control, the Act[s] and regulations permit no one else to move the horses [animals] no matter where they are. No one else can manage the horses [animals]. Land owners cannot move them from their land. If the horses [animals] stray from public lands onto private lands the owners must request the government to remove the horses [animals] if they want them off their land.

Opinion of the Court, *supra* at 5-6 (bracketed materials added).

Indeed, under some of the acts, there are circumstances in which the private owners have no remedy whatever. *See, e.g.,* situations in which removal or destruction of endangered species will further endanger or deplete the population. 50 C.F.R. § 2223(c) (1983).

What the foregoing illustrates is simply that the Wild and Free-Roaming Horses and Burros Act is legally nothing more nor less than a run-of-the-mill regulatory scheme enacted by Congress to insure the survival of a particular species of wild animals. Once that fact is acknowledged, and it must be, the correctness of the trial court's conclusion that the grazing of these wild horses and burros on private land did not constitute a fifth amendment taking flows inexorably.

In several recent decisions the Supreme Court has reaffirmed the long standing constitutional rule that regulatory actions mandated by Congress do not constitute a taking for the purposes of the fifth amendment. In *Andrus v. Allard,* 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979), the Court clarified its stance on the takings clause:

> *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 123-128 [98 S.Ct. 2646, 2658-2661, 57 L.Ed.2d 631] (1978), is our most recent exposition on the Takings Clause. That exposition need not be repeated at length here. Suffice it to say that government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922); see *Penn Central, supra,* 438 U.S. at 124, 98 S.Ct. at 2659.

Id. at 65, 100 S.Ct. at 326; *see Loretto v. Teleprompter Manhattan City Corp.,* 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

The facts of this case do not begin to reach the extreme of burdens placed on property holders which have been sustained against claims of fifth amendment taking without just compensation. See, *e.g., Goldblatt v. Town of Hempstead,* 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) (ordinance prohibiting excavation below certain level did not constitute a taking of land used for sand and gravel mining); *Miller v. Schoene,* 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) (statute which mandates the destruction of red cedar trees in order to protect apple orchards held not to constitute a taking); *Euclid v. Ambler Realty Co.,* 272 U.S. 365, 384, 47 S.Ct. 114, 117, 71 L.Ed. 303 (1926) (enactment of zoning ordinance limiting uses of unimproved property reducing property's value by sev-

enty-five percent did not constitute a taking"; *Hadacheck v. Sebastian,* 239 U.S. 394, 405, 36 S.Ct. 143, 143, 60 L.Ed. 348 (1915) (ordinance precluding the manufacture of brick did not constitute a taking even though it reduced value of petitioner's land to less than one-tenth its prior value).

Plaintiffs in this case have not even argued, much less put on proof that they have been deprived of all beneficial use of their land. In analyzing these cases challenging regulatory schemes under a claim of fifth amendment rights, neither this court, the Supreme Court, nor any other court has ever divided the property owners' interest into sections such as mouths full of forage (individual lambs, individual trees), or high rise buildings as opposed to vastly less profitable low density development. Indeed, in *Miller v. Schoene,* 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928), the Supreme Court rejected a taking without just compensation attack on a regulatory scheme even though the state of Virginia through its own personal agents went on the property owner's land to cut down and remove trees to benefit apple orchard owners at the direct expense of red cedar owners. *Id.* at 279, 48 S.Ct. at 247. That case is a much stronger case than the present one for finding a taking because in *Miller* the government's scheme was designed to protect apple trees on the lands of private land owners, not the broad direct national interest as in this case.

There is not the slightest hint in the cases to suggest that the government's interest in preserving the ecological environment for the entire nation is any less legally important than Virginia's interest in the misfortunes of apple growers. This case is an even stronger case than *Mil-*

ler for upholding government regulation from an attack under the takings clause. Here the shift in burdens and benefits takes place between public and private parties, rather than a shift between two private parties. *Miller.* In either case the government has determined that a shift in the burden to a private individual or individuals was required for the public benefit.

This regulatory scheme, as all regulatory schemes, imposes substantial burdens on many owners of property interests. *Miller v. Schoene,* 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928). There remains only one point to be considered. That is whether the congressional attempts to ameliorate the burden on adjacent property holders some how mystically converts that burden into a fifth amendment taking. In light of all of the cases, it cannot be doubted that Congress, in the absence of an allegation or showing that the residual interest of the property owner in his entire parcel is rendered substantially useless, could altogether prohibit interference with the wild horses and burros without providing an ameliorative scheme.

Justice Holmes, in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413-14, 43 S.Ct. 158, 159-60, 67 L.Ed. 322 (1922), characterized a taking as control by the government of a person's use of property which virtually destroys the property's value. It is important not to lose focus of the fact that although there is an allegation that the grazing value of the private checkerboard land is substantially reduced by the wild horses and burros, no allegation or offer of proof even suggests that the grazing value is completely destroyed or even destroyed to the point of being essentially useless.

Although there was a request for only nominal damages, if this court's opinion stands, it forms the predicate for a damage action for the full amount of "taken" property consumed by wild horses from the date of this judgment forward. If a principled course is followed hereafter, it also lays the predicate for fifth amendment compensation for all damage to livestock and crops caused by all animals which fall under the control and management of the Department of Interior.

The opinion of the court is even more troublesome because it is impossible to determine from the court's opinion precisely what constitutes the taking under this sweeping new notion of the fifth amendment or at what point one begins to measure the taking. As the court itself has said of its opinion, "The allegations as to a taking do not refer or rely on a single event or occurrence but to a continued course of action during the year for a period of years." Opinion of the Court, *supra* at 795. It apparently does refer to forage because of the court's citation to personal property as falling within the protection of the fifth amendment. Indeed, as presently structured, the court's opinion gives the trial court an imponderable task. On remand there are no damages to assess except nominal ones. The court's mandate reads:

> The judgment of the trial court is reversed as to the issue of the taking of forage for a factual determination whether such forage was taken by the continued failure to manage the horses and by permitting their continued use of private lands by the increased number of horses and burros since 1971.

Opinion of the Court, *supra* at 795 [App. 44a-45a].

The court's opinion does not give us or the trial court the guidance necessary to determine whether the taking

consists of all forage consumed by all wild horses on private land from the moment they enter the private land in the checkerboard area; all forage consumed and damage caused from the moment that there is a request for removal of horses from private lands; all forage consumed by some number of horses in excess of some undetermined reasonable number; the forage taken by all horses grazing on private lands in excess of the numbers which were there in 1971; forage consumed under one of the foregoing categories but only after a lapse of reasonable time after notice to the Secretary to remove a particular number of horses; or some other imponderable assessment for which the trial court is given inadequate theoretical guidance.

Though it is not clear to me, apparently the court bases its conclusion that this wild life management scheme has become an instrument of taking because of the ameliorative clause directing the Secretary to remove wild horses from private lands on request. This ameliorative clause in substance is no different from that in the bald eagle act, the endangered species act, or numerous other acts. That the language of the ameliorative provision is mandatory in form does not change the fundamental nature of the act from one regulating a national asset into an instrument of taking of private property any more than the ameliorative provisions of miriads of other regulatory schemes. At most, the mandatory language of this provision raises either a question of mandamus (which unlike the court I do not believe is before us because the government has not cross-appealed from the grant of manda-

mus[1]) or an issue of whether Congress has in effect authorized a private right of action. As to this latter point, the Supreme Court's recent cases make clear that unless Congress has expressly or otherwise clearly manifest an intent to create a private right of action, no such private right of action exists. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 456 U.S. 353, 374-78, 102 S.Ct. 1825, 1837-1839, 72 L.Ed.2d 182 (1982); *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 15, 100 S.Ct. 242, 245, 62 L.Ed.2d 146 (1979); *see also California v. Sierra Club,* 451 U.S. 287, 292-93, 101 S.Ct. 1775, 1778-79, 68 L.Ed.2d 101 (1981).

All of the unsound consequences and the absence of any clearly articulated theory of what the cause or instrument of the taking is could and legally should be avoided by beginning at the legally unavoidable conclusion that the Act is a regulatory scheme by which Congress intends to insure the survival of wild horses and burros just as it has done in the case of numerous other birds and animals as well as in all other regulatory schemes for the benefit of the general public.

I agree, however, with the court that the denial of damages against the Secretary should be affirmed.

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1. On March 3, 1981, and March 13, 1981, the trial court granted defendants' and plaintiffs' respective motions for partial summary judgment. The March 13 order granted plaintiffs' request for mandamus to have the horses removed. Record, vol. 3 at 518. Defendants appealed that ruling but that appeal was dismissed by this court for want of jurisdiction because not all claims had been settled. *Id.* at 529-38. In the current appeal the defendants have not cross-appealed the issue of mandamus nor do they allege that the granting of mandamus was error.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

MOUNTAIN STATES LEGAL FOUNDATION,	)	
and	)	
ROCK SPRINGS GRAZING ASSOCIATION,	)	
Plaintiffs,	)	C79-275K
v.	)	
JAMES G. WATT, as Secretary of the Interior, et al.,	)	
Defendants.	)	

ORDER

By stipulation of the parties, it is hereby ordered as follows:

1. The court's Order of March 13, 1981, as amended by Orders of this court, is further amended to provide that the BLM (Bureau of Land Management) shall remove all wild and free-roaming horses from the administrative unit of the BLM, referred to as the Rock Springs District, in excess of the numbers agreed upon for maintenance within the District by November 30, 1985.

2. It is further ordered that the BLM is to conduct its wild and free-roaming horse gatherings in the State of Wyoming in the following manner:

a. For the remainder of fiscal year 1984, all wild and free-roaming horses to be gathered in the State of Wyoming shall be removed from the Rock Springs District, *provided that,* if the BLM determines that the protection of resources of the public lands or private lands requires that certain wild and free-roaming horses in another district be removed from the public or private lands on which they are located, the BLM shall request the consent of the plaintiffs for permission to gather such horses, such consent to be not unreasonably denied.

b. For fiscal year 1985, 10 percent of the total number of wild and free-roaming horses to be gathered in the State of Wyoming may be gathered outside of the Rock Springs District without the consent of the plaintiffs; *provided that* the BLM agrees that to the extent it schedules removal of horses from the Rawlins District pursuant to this provision, it will consider removal of horses from portions of the Rawlins District that border upon the Rock Springs District to be a priority. Furthermore, in regard to fiscal year 1985, the BLM shall gather the remaining 90 percent of the total number of wild and free-roaming horses to be gathered in the State of Wyoming from the Rock Springs District; *provided that,* if the BLM determines that the protection of resources of the public lands or private lands requires that certain wild and free-roaming horses in another district be removed from the public or private lands on which they are located, the BLM shall request the consent of the plaintiffs for permission to gather such horses, such consent to not be unreasonably denied. In ascertaining the reasonableness of consent to out-of-district gathering pursuant to this provision, the possibility of including such gatherings in the unrestricted 10 percent may be considered.

c. For fiscal year 1986, 90 percent of the total number of wild and free-roaming horses scheduled to be gathered in the State of Wyoming in the so-called fall gathering (which generally is completed on or about November 30 of a calendar year) shall be removed from the Rock Springs District; *provided that*, if the BLM determines that the protection of resources of the public lands or private lands requires that certain wild and free-roaming horses in another district be removed from the public or private lands on which they are located, the BLM shall request the consent of the plaintiffs for permission to gather such horses, such consent to not be reasonably [sic] denied; *and provided further that*, the BLM shall not be required to remove horses from the Rock Springs District that have been agreed upon for maintenance in the area.

d. The court shall retain jurisdiction to settle any disputes that might arise as to the reasonableness of out-of-district removal.

4. Reference is made to a cooperative agreement entered into between the Department of the Interior, BLM, and the Cheyenne River Sioux Tribe of South Dakota, executed by the Tribe on July 10, 1984. This agreement provides for the adoption by Indians of the Tribe of wild and free-roaming horses that have been deemed to be "unadoptable." See preamble to amendment of 43 CFR 4740.4-3 at 49 F.R. 20654 (May 16, 1984). The agreement further states that the Indians shall acquire the horses at a site mutually agreeable to both parties. It is further ordered, that in administering this cooperative agreement, the

BLM shall designate the adoption facility located in Rock Springs, Wyoming, as the only site agreeable to it until the Indians have adopted 1,100 horses; *provided that,* if the plaintiffs so agree upon consultation, an alternative site may be designated for any reason. Furthermore, the BLM is ordered that in administering this agreement, until the Indians pursuant to the agreement have adopted 1,100 horses, the "unadoptable" horses made available to the Indians for selection shall be comprised of at least 90 percent wild and free-roaming horses that have been gathered in the State of Wyoming; *provided that,* if there is not a sufficient number of "unadoptable" horses gathered in Wyoming available at the Rock Springs facility, the BLM may make other "unadoptable" wild and free-roaming horses in the facility available for selection if the plaintiffs so agree upon consultation.

So ordered in open court this 28th day of September 1984.

/s/ Ewing T. Kerr
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

MOUNTAIN STATES LEGAL FOUNDATION, a non-profit corporation, on behalf of its members who use and enjoy the public lands in the Rock Springs, Wyoming area, and the ROCK SPRINGS GRAZING ASSOCIATION, which owns and leases lands in the Rock Springs, Wyoming area,	)	
Plaintiffs,	)	
vs.	)	No. C79-275K
JAMES G. WATT, as Secretary of the Department of the Interior, DELAINE ROBERTS as United States Marshal of the District of Wyoming, JOHN DOE, individually, an unknown officer or agent of the Department of the Interior and the UNITED STATES OF AMERICA,	)	
Defendants.	)	

ORDER RULING ON MOTIONS
FOR SUMMARY JUDGMENT
(With Findings)

(Filed February 19, 1982)

The above-entitled matter coming on regularly for hearing before the Court upon plaintiffs' and defendants' Motions For Summary Judgment, plaintiffs appearing by and through their attorneys, William H. Mellor III and R. Norman Cramer, and defendants appearing by and through their attorneys, Toshiro Suyematsu and James P.

Leape, and the Court having heard the arguments of counsel in favor of and in opposition to said motions, and the Court having carefully considered the pleadings, affidavits, Opinion of the Tenth Circuit Court of Appeals, and the memoranda submitted by counsel in support of their respective theories of the case, and the Court being fully advised in the premises;

FINDS that this action arises under the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331 et seq. (the Act). The case appears to be one of first impression based upon a unique factual situation. The relevant facts are clear and not in dispute. Counsel have stipulated that the amount of damages in question is ten dollars ($10.00). This amount is sought to establish the principle that plaintiffs are entitled to compensation under the Fifth Amendment for use of the grass consumed by excessive wild horses.

In an Order entered on March 13, 1981, this Court ordered the Secretary of the Interior to remove the excess wild horse population from the checkerboard area located near Rock Springs, Wyoming, pursuant to the Act. The Order was appealed to the Tenth Circuit Court of Appeals. Said Court declined to consider the issues here involved, predicated upon the fact that the appeal was not filed in a timely fashion because all of the issues in the action had not yet been resolved by this Court.

The major issue remaining before this Court is simply stated: Are plaintiffs entitled to recover compensatin under the Fifth Amendment for forage consumed on their private lands by wild horses in excess of the numbers provided for under the Act? After lengthy consider-

ation, the Court is compelled to answer the above-stated issue in the negative under the facts of this case.

The Fifth Amendment to the United States Constitution reads in relevant part as follows:

> . . . . nor shall private property be taken for public use, without just compensation.

A review of the case law establishes that each action is to be reviewed upon its own facts. Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

In the case of Andrus v. Allard, 444 U.S. 51 (1979), the Supreme Court discussed the taking issue with regard to regulatory actions mandated by Congress and carried out by the Secretary of the Interior:

> Penn Central Transportation Co. v. New York City, 438 U.S. 104, 123-128 (1978), is our most recent exposition on the Takings Clause. That exposition need not be repeated at length here. Suffice it to say that government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); see Penn Central, supra, at 124.
>
> The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of " 'justice and fairness.' " Ibid.; see Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962). There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. Form-

ulas and factors have been developed in a variety of settings. See Penn Central, supra, at 123-128. Resolution of each case, however, ultimately calls as much for the exercise of judgment as for the application of logic.

The Act involved herein is essentially regulatory in nature. Although it is clear that forage is a protected property interest under Wyoming law, the lack of enforcement of the Act under these particular facts does not rise to the level where justice and fairness are violated. Plaintiffs property has not been entirely destroyed. The Supreme Court has often held that diminution in value is not a basis for compensation under the Fifth Amendment. Penn Central, supra; Hadacheck v. Sebastian, 239 U.S. 394 (1915). This Court holds that, under this particular factual situation, no taking has occurred under the Fifth Amendment. The remedies available to plaintiffs have already been exercised in the form of an Order issued by this Court directing the Secretary of the Interior to remove the excess horses from plaintiffs' property.

This Court is not holding that failure to enforce regulations will never be compensable under the Fifth Amendment, only that the use of private lands by excess horses under the Act does not rise to the level of a Fifth Amendment violation.

NOW, THEREFORE, IT IS ORDERED that the Motion For Summary Judgment seeking damages in the amount of ten dollars ($10.00) filed by and on behalf of plaintiffs be, and the same is, hereby denied; it is

FURTHER ORDERED that the Motion For Summary Judgment filed by and on behalf of defendants be, and the same is, hereby granted.

Dated this 19th day of February, 1982.

/s/ Ewing T. Kerr
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

MOUNTAIN STATES LEGAL FOUNDATION, a non-profit corporation, on behalf of its members who use and enjoy the public lands in the Rock Springs, Wyoming area, and the ROCK SPRINGS GRAZING ASSOCIATION, which owns and leases lands in the Rock Springs, Wyoming area,	)	
Plaintiffs,	)	
vs.	)	No. C79-275K
JAMES G. WATT, as Secretary of the Department of the Interior, DELAINE ROBERTS as United States Marshal of the District of Wyoming, JOHN DOE, individually, an unknown officer or agent of the Department of the Interior and the UNITED STATES OF AMERICA,	)	
Defendants.	)	

ORDER AMENDING JUDGMENT
NUNC PRO TUNC

(Filed February 19, 1982)

The above-entitled matter coming on regularly for hearing before the Court upon defendants' Motion to Revise Judgment, plaintiffs appearing by and through their attorneys, William H. Mellor III and R. Norman Cramer, and defendants appearing by and through their attorneys, Toshiro Suyematsu and James P. Leape, and the Court having heard the arguments of counsel in favor of and in opposition to said motion, and the Court having carefully

considered the pleadings, the Order of this Court filed March 13, 1981 granting partial summary judgment, the stipulation of counsel and the memoranda of counsel in support of their respective theories of the case, and the Court being fully advised in the premises;

NOW, THEREFORE, IT IS

ORDERED that the Order entered on the 13th day of March, 1981 be amended to include the following paragraphs on page 2 of said Order: it is

"FURTHER ORDERED that the Bureau of Land Management has determined that the appropriate management level for the horse herds on the Salt Wells/Pilot Butte checkerboard lands is that level agreed to by the landowners in that area. All horses on the checkerboard above such levels are 'excess' within the meaning of 16 U.S.C. 1332(f) (1976 and Supp. III); it is

FURTHER ORDERED that, in the Final Environmental Impact Statement for the Sandy Area, the Bureau of Land Management's proposed action was for an average herd management level in that area of 825 animals. All horses in the Sandy Resource Area above that level are 'excess'; it is

FURTHER ORDERED that, in the Kemmerer Resource Area, the Bureau of Land Management has determined, on the basis of a land use plan, that the wild horse herd should be reduced to zero. All wild horses in that area are also 'excess' "; it is

FURTHER ORDERED that the last paragraph on page 2 be amended to read as follows:

". . . that the Rock Springs District office of the Bureau of Land Management shall by September 1, 1984 remove all excess horses from within the Rock Springs District"; it is

FURTHER ORDERED that the first paragraph on page 3 be amended as follows:

"FURTHER ORDERED that 'excess,' as used in this Order, means those wild horses above the population level that the Bureau of Land Management has determined to be appropriate, in accordance with its multiple-use management responsibilities under 16 U.S.C. 1332(f) and 1333; or, in the absence of such a determination, the number of horses above the number present at the time the Act was passed."

Dated this 19th day of February, 1982.

/s/ Ewing T. Kerr
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

MOUNTAIN STATES LEGAL FOUNDATION, et al.,	)	
Plaintiffs,	)	
vs.	)	No. C79-275K
	)	
CECIL D. ANDRUS, et al.,	)	
Defendants.	)	

ORDER DISMISSING CLAIM VI

(Filed January 13, 1982)

Upon motion of the plaintiffs and for good cause shown; it is

ORDERED that Claim VI of the Complaint be, and the same is, hereby dismissed.

Dated this 13th day of January, 1982.

/s/ Ewing T. Kerr
U. S. District Judge

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MOUNTAIN STATES LEGAL FOUNDATION, a nonprofit corporation, on behalf of its members who use and enjoy the public lands in the Rock Springs, Wyoming, area and the ROCK SPRINGS GRAZING ASSOCIATION, which owns and leases lands in the Rock Springs, Wyoming area,	)	
Plaintiffs-Appellants, Cross-Appellees,	)	No. 81-1513 &
v.	)	No. 81-1537
CECIL D. ANDRUS, as Secretary of the Department of the Interior, JAMES W. BYRD as United States Marshal of the District of Wyoming, FRANK GREGG, individually, Director of the Bureau of Land Management, and the UNITED STATES OF AMERICA,	)	
Defendants-Appellees, Cross-Appellants.	)	

Appeal from the United States District Court
For the District of Wyoming

(D. C. No. C79-275-K)

(Filed September 18, 1981)

Before BARRETT, HILL, and McKAY, Circuit Judges.

PER CURIAM.

After examining the briefs and the appellate records, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of these appeals. *See* Fed. R. App. P. 34(a); Tenth Circuit R. 10(e). The causes are therefore ordered submitted without oral argument.

The underlying action arose under the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331, et seq. Plaintiffs' complaint, as amended, set out six claims for relief. By orders entered on March 3, 1981, and March 13, 1981, the district court granted defendants' and plaintiffs' respective motions for partial summary judgment. Those orders, as we read them, appear to resolve only the first, second, third and fifth claims for relief. The orders were silent as to the remaining claims.

It is settled law that an order which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not terminate the action and is not immediately reviewable. *See* Fed.R.Civ.P. 54(b); Golden Villa Spa, Inc. v. Health Industries, Inc., 549 F.2d 1363 (10th Cir. 1977). Counsel for defendants concedes that the district court has not yet entered final judgment.

Accordingly, we conclude that these appeals are premature and should be dismissed for lack of appellate jurisdiction.

Appeals dismissed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

- 0 -

MOUNTAIN STATES LEGAL FOUNDATION, a non-profit corporation, on behalf of its members who use and enjoy the public lands in the Rock Springs, Wyoming, area and ROCK SPRINGS GRAZING ASSOCIATION, which owns and leases lands in the Rock Springs, Wyoming, area,	)	
Plaintiffs,	)	
vs.	)	C79-275K
CECIL D. ANDRUS, as Secretary of the Interior, JAMES W. BYRD, as United States Marshal of the District of Wyoming and the UNITED STATES OF AMERICA,	)	
Defendants.	)	

ORDER GRANTING MOTION FOR
PARTIAL SUMMARY JUDGMENT

(Filed March 13, 1981)

The above-entitled matter coming on regularly for hearing before the Court upon plaintiffs' Motion for Partial Summary Judgment, plaintiffs appearing by and through their attorneys, William H. Mellor III, R. Norman Cramer and Calvin E. Ragsdale, and defendants appearing by and through their attorney, Jeffrey C. Fisher, and the Court having heard the arguments in support of and in opposition to said motion, and having carefully re-

viewed the pleadings and memoranda submitted by counsel, and being fully advised in the premises;

FINDS that this case arises under the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. Section 1331, et seq. (the Act). Jurisdiction is based on 28 U.S.C. Section 1331.

16 U.S.C. Section 1333(a) provides in pertinent part that "all wild free-roaming horses and burros are hereby declared to be under the jurisdiction of the Secretary for the purpose of management and protection . . . ". Furthermore, the section provides that the animals shall be managed in a manner which achieves and maintains a thriving ecological balance on the public lands.

In derogation of the above provisions, the wild horse population has dramatically increased and the excess demand on grazing lands has created severe problems for ranchers in the Rock Springs area and for the ecological balance of the range.

After the passage of the Act, the first Bureau of Land Management (BLM inventory revealed 2,364 wild horses in the Rock Springs area in February, 1972, with 1,116 of these horses located on the lands of the Rock Springs Grazing Association (Association). As of March, 1979, 6,129 wild horses were in the Rock Springs District, with 3,413 of these on the lands of the Association.

The BLM has not removed a significant number of horses from the area from January 1, 1972, through September 1, 1976. Such inaction is clearly contrary to the Act and to Congressional mandate, and as such is unacceptable to this Court.

NOW, THEREFORE, IT IS

ORDERED that the Motion for Partial Summary Judgment filed by and on behalf of plaintiffs be and the same is hereby granted; it is

FURTHER ORDERED that the Rock Springs District office of the Bureau of Land Management shall within one year from the date of this Order remove all wild horses from the checkerboard grazing lands in the Rock Springs District except that number which the Rock Springs Grazing Association voluntarily agrees to leave in said area; it is

FURTHER ORDERED that the Rock Springs District office of the Bureau of Land Management shall within two years of the date of this Order remove all excess horses from within the Rock Springs District; it is

FURTHER ORDERED that excess as defined in this Order and the Act means that the wild horse population exceeds the number deemed appropriate by a final environmental statement. In the absence of such a statement excess means that the number of horses exceeds the number present in the same area at the time the Act was passed; it is

FURTHER ORDERED that each party is to bear their own costs.

Dated this 13th day of March, 1981.

/s/ Ewing T. Kerr
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

MOUNTAIN STATES LEGAL FOUNDATNON, et al.,	)	
Plaintiffs,	)	
vs.	)	No. C79-275K
	)	
CECIL D. ANDRUS, et al.,	)	
Defendants.	)	

ORDER RULING ON MOTIONS

(Filed March 3, 1981)

The above-entitled matter coming on regularly for hearing before the Court upon plaintiffs' Motion to Compel Discovery and to Strike and defendants' Motion for Partial Summary Judgment, plaintiffs appearing by and through their attorneys, William H. Mellor III, R. Norman Cramer and Calvin E. Ragsdale, and defendants appearing by and through their attorney, Jeffrey C. Fisher, and the Court having heard the arguments in support of and in opposition to said motions, and having carefully reviewed the pleadings and memoranda submitted by counsel, and being fully advised in the premises;

NOW, THEREFORE, IT IS

ORDERED that the Motion to Compel Discovery filed by and on behalf of plaintiffs be and the same is hereby denied; it is

FURTHER ORDERED that the Motion to Strike the Affidavit of Frank Gregg filed by and on behalf of plaintiffs be and the same is hereby denied; it is

FURTHER ORDERED that the Motion for Partial Summary Judgment filed by and on behalf of defendants